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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *et al.*, *Petitioners,*

vs.

SWITCHMEN'S UNION OF NORTH AMERICA, *et al.*, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Chicago, Rock Island & Pacific Railroad Company *et al.*, pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this case on June 9, 1961.

Opinions Below

The opinion of the court of appeals (Appendix A, *infra*, pp. 29-50) has not yet been officially reported. The opinion of the district court (S. A. 170-174) is reported in 187 F. Supp. 581; its findings of fact and conclusions of law appear at S. A. 163-170.[1]

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[1] S. A. denotes the Switchmen's Appendix below, and C. A. denotes the Carriers' Appendix below.

Jurisdiction

The judgment of the court of appeals was entered on June 9, 1961. The petitioners' petition for rehearing was denied on June 19, 1961. Jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

1. Where, during a major labor dispute, railroads seek a permanent injunction directing a railroad labor union, its officers, and members to bargain in accordance with the Railway Labor Act, does the Norris-La Guardia Act preclude a district court from issuing a preliminary injunction to preserve the *status quo* by barring a threatened strike pending a hearing on the merits, where the district court finds that

(a) the complaint presents serious, substantial, difficult, and doubtful questions going to the merits of the case; and

(b) the railroads and the public will suffer serious, substantial, and irreparable injury unless temporary relief is granted which far outweighs any possible injury which might result ~~if relief were denied~~ therefrom?

2. Does the Railway Labor Act require that the representatives of the parties to a major railroad labor dispute be authorized to decide such a dispute in conference?

3. Has a railroad labor union, which is the certified representative of railroad employees engaged in a major labor dispute, complied with the mandatory duties imposed by the Railway Labor Act where the union has not only failed to designate negotiators with authority to decide the dispute in conference, but also has refused to recommend that its members accept a proposed settlement osten-

sibly agreed to by its negotiators, has failed to make any counter-proposals for settlement of the dispute, and has refused to submit the National Mediation Board's proffer of arbitration to its members for acceptance?

4. Where a district court, having heard the testimony of two railroad negotiators and one railroad union negotiator personally appearing before said court, finds, in accordance with the testimony of the railroad witnesses, that the union and its representatives have at no time engaged in good faith efforts to reach final agreement of an existing major labor dispute, or offered to enter into any agreement in settlement of said dispute, may a court of appeals set aside such findings and substitute its own findings to the contrary?

Statutes Involved

The pertinent provisions of the Railway Labor Act and the Norris-La Guardia Act appear in Appendix B, *infra*, pp. 51-54.

Statement

Petitioners are the Chicago, Rock Island and Pacific Railroad Company and sixteen other railroads. Respondents are the Switchmen's Union of North America (hereinafter referred to as SUNA) and certain of its officers.

SUNA is a railroad labor union which has been certified as the bargaining representative of yard ground service employees (yard conductors or foremen, yard brakemen or helpers, and switchtenders) employed by petitioners (S. A. 163). Eleven per cent of such employees employed by the principal railroads of the country are represented by SUNA; the remaining 89% are represented by a rival organization, the Brotherhood of Railroad Trainmen (S.A. 20,147).

In 1959, SUNA, the Brotherhood of Railroad Trainmen, and other unions representing other classes of employees (*e.g.*, yard engineers and firemen, road service employees, and nonoperating employees), each served notices, pursuant to the Railway Labor Act, requesting increases in pay (S.A. 20, 163-164). The railroads, including petitioners, served counter-proposals for decreases in pay (S.A. 20-21, 164). Individual conferences were held between the various railroads and unions (S.A. 164). When such conferences failed to result in any agreement, the proposals and counter-proposals were referred to national committees for handling (S.A. 5-6).

The railroads designated a Western Carriers' Conference Committee to negotiate with SUNA (S.A. 164). This committee was given full power to negotiate, bargain, and settle the dispute between SUNA and the railroads (S.A. 86). SUNA also designated a negotiating committee (S.A. 164). This committee, however, had no power to settle the dispute because of a provision in the SUNA constitution, added in 1955, which provides:

> "No authority shall exist to settle a general wage and/or rules movement arising from direct negotiation with a carrier or from mediation excepting only after approval by a majority vote of the membership, as hereinafter set forth." (S.A. 164)

After futile negotiations (S.A. 21), the services of the National Mediation Board were invoked, pursuant to Section 5 First of the Railway Labor Act (45 U. S. C. § 155 First) (S. A. 165-166). After conducting mediation proceedings, the Mediation Board notified the parties that its efforts had been unsuccessful and requested the parties to submit their dispute to arbitration, pursuant to Sections 5 First and 7 First of the Railway Labor Act (45 U. S. C. §§ 155 First, 157 First) (S. A. 166). The railroads accepted the proffer of arbitration (S. A. 166). SUNA's negotiators had no authority to accept, since the SUNA constitution provides:

> "No authority shall exist to agree to submit to arbitration excepting only after there is an approval to submit to arbitration by a majority vote of the membership." (S. A. 165)

Despite the fact that only the members could approve arbitration, SUNA rejected the Mediation Board's proposal without submitting it to the members for a vote (S. A. 166).

SUNA's constitution provides:

> "If a reasonable attempt to settle by mediation fails, the International President must immediately submit a strike ballot to the membership. If a majority of said membership voting approves the strike ballot then the International President shall immediately set a strike date and withdraw the members from service unless the President of the United States appoints an emergency board pursuant to pertinent Federal law." (S. A. 165)

The SUNA membership voted to strike (S. A. 21).

Thereafter, as provided by Section 10 of the Railway Labor Act (45 U. S. C. §160), the President created Emergency Board No. 131 to investigate the dispute between SUNA and petitioners (S. A. 166). Section 10 barred a strike, or any other change in conditions by either side, until thirty days after the Board had submitted its report.

The Emergency Board recommended a 17¢ per hour increase in basic rates on May 1, 1960, and further increases of 2% effective July 1, 1960, and 2% March 1, 1961 (S.A. 18-34). These recommendations followed a pattern of settle-

ments, first established by an arbitration award for employees represented by the Brotherhood of Locomotive Engineers, and subsequently accepted by all other labor organizations representing operating employees in road and yard service, including the Brotherhood of Railroad Trainmen, the Order of Railway Conductors and Brakemen, and the Brotherhood of Locomotive Firemen and Enginemen. At about the same time, comparable benefits were recommended for nonoperating employees by Emergency Board No. 130 and accepted by the various nonoperating organizations (S. A. 166).

The Western Carriers' Conference Committee offered to enter into an agreement with SUNA which followed the recommendations of Emergency Board No. 131 (S. A. 42-46). The SUNA committee had no authority to accept this proposal, since the SUNA constitution provides:

> "No authority shall exist to accept any recommendation of an emergency board excepting only after approval of same by a majority vote of the membership voting." (S. A. 165)

The Carriers' Committee and the SUNA committee did agree upon the text of a proposed agreement embodying the Emergency Board's recommendations, which was submitted to the SUNA membership (S. A. 166). The SUNA committee and officers, however, failed and refused either to sign or to recommend the adoption of this agreement, and the SUNA members voted to reject the settlement (S. A. 166-167).

SUNA's constitution provides that:

> "If a majority of the membership voting fails to approve the recommendation of the emergency board then the International President must immediately set another strike date and withdraw the members from service." (S. A. 165)

SUNA set September 19, 1960, as the date for the commencement of its strike (S. A. 8-9).

On September 16, 1960, petitioners filed their complaint herein to compel respondents to bargain in good faith (S. A. 3-17). The complaint alleged that respondents had violated the mandatory duties imposed upon them by the Railway Labor Act in that they had failed to bargain in good faith and had failed to designate bargaining representatives with authority to consider and decide the existing dispute in conference.

The District Court granted a temporary restraining order on September 16 (S. A. 49), and on September 26 and 27 held a hearing on petitioners' motion for a preliminary injunction. At this hearing the parties presented witnesses and exhibits. (S. A. 84-162; C. A. 1-7.) At the request of the National Mediation Board the United States appeared as *amicus curiae,* contending that the restrictions placed upon SUNA's bargaining representatives were inconsistent with the Railway Labor Act, defeated its purposes, and rendered administration of the Act cumbersome and ineffective (C. A. 7-12). The Government's brief endorsed the requested relief (see S. A. 172).

The District Court found that at no time had respondents "engaged in good faith efforts to reach final agreement with the Western Carriers' Conference Committee" (S. A. 167). The Court further found that respondents had declined arbitration without submitting the question to its members (S. A. 166), that the respondents had refused to sign or recommend the proposed agreement embodying the Emergency Board's proposals (S. A. 166-167), had not offered to enter into any agreement in settlement of the dispute (S. A. 167), and, except for the strike vote and the proposed agreement which they refused to recommend, had

not submitted any proposal to the membership (S. A. 167). In its opinion, the District Court stated:

> "Whatever may be the precise limits of the duty to negotiate as imposed by the above provisions [of the Railway Labor Act], the court is satisfied that the duty is not performed by placing at the bargaining table persons who are divested of authority to decide, who in fact refrain from presenting specific proposals or counter-proposals on behalf of the union, and who, when an offer is made for presentation to the membership, refuse either to sign or to recommend its adoption by the membership. The result is, in my opinion, to frustrate the intent of the Act to facilitate the expeditious settlement of labor-management disputes under the Act." (S. A. 172-173)

In addition, the District Court found that there were "serious, substantial, difficult, and doubtful questions going to the merits of this case" as to whether respondents had exerted every reasonable effort to make and maintain an agreement with respect to the dispute, had failed to bargain in good faith, had failed to confer appropriate authority on their bargaining representatives, or had unlawfully incapacitated themselves from performing their duties under the Railway Labor Act by the terms of the SUNA constitution (S. A. 167-168).

The District Court also found that the threatened strike would result in serious, substantial and irreparable injury to petitioners and to the public unless relief were granted which outweighed any injury which could possibly result to respondents by granting the relief sought (S. A. 168-169).

The District Court concluded that:

> "The issues between the plaintiffs and defendants raise novel, difficult, and important questions of law which should be determined only after a full hearing upon the merits of the case; there is a fair ground for litigation and for more deliberate investigation on the merits of this action. The status quo should be maintained until the final hearing and disposition of the case." (S. A. 169)

Accordingly, the District Court granted a preliminary injunction, pending further proceedings.

Before these further proceedings could take place, SUNA appealed from the order granting the preliminary injunction (S. A. 2).[2] On June 9, 1961, the Court of Appeals reversed the lower court's order, but granted respondents' motion for a stay of its mandate pending certiorari.

The Court of Appeals recognized that this case "raises important questions as to the interrelations of the Railway Labor Act . . . and the Norris-La Guardia Act. . . ." (App. A, p. 30). It found that the basic question in this case—"whether an anti-strike injunction of the sort banned by § 4 of Norris-La Guardia may be issued in a 'major' railway dispute when there has been a violation of the Railway Labor Act"—had not been determined by this Court (App. A, p. 39).[3] Instead of directly deciding this basic question, which cannot properly be avoided on this record,

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[2] By appealing, SUNA ousted the District Court from jurisdiction to take any further action. *United States* v. *Radice*, 40 F. 2d 445, 446 (2d Cir., 1930); *Commonwealth Ins. Co.* v. *O. Henry Tent & Awning Co.*, 273 F. 2d 163 (7th Cir., 1959); *Hunter Douglas Corp.* v. *Lando Products*, 235 F. 2d 631 (9th Cir., 1956); *In re McLean Store Fixtures Corp.*, 70 F. 2d 217 (1st Cir., 1934). Although SUNA filed its notice of appeal on October 17, 1960 (S.A.2), SUNA requested and received four extensions for filing the record and its brief. Petitioners neither sought the appeal nor caused any delay after the appeal was filed (cf. App. A, p. 49).

[3] A "major" dispute is one concerning the negotiation of a collective bargaining agreement; a "minor" dispute is one concerning grievances or contract interpretation questions. *Elgin, Joliet & Eastern R. Co.* v. *Burley*, 325 U.S. 711, 723-724. In *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana R. Co.*, 353 U.S. 30, this Court upheld an injunction against a strike arising out of a minor dispute.

the Court of Appeals reversed the preliminary injunction on the following erroneous grounds:

First, it held that the general standards for issuing or reviewing a preliminary injunction are not applicable in a Railway Labor Act case. It concluded that under the Norris-La Guardia Act, a court is ordinarily without power to issue a preliminary injunction to preserve the *status quo* pending full consideration of the merits, even when the complaint seeks to enforce the Railway Labor Act; and that the District Court's determination that the case presented "serious, substantial, difficult, and doubtful questions" on the merits, together with its finding of irreparable injury, was inadequate to sustain its action. To justify a preliminary injunction in a railroad labor dispute, the court of appeals held that a plaintiff must prove its case on the merits!

Second, it held that Sections 2 First and Second of the Railway Labor Act do not require the parties to negotiations conducted under that Act to designate representatives with authority to conclude disputes.

Third, it held the District Court's finding that respondents had not bargained in good faith to be clearly erroneous, rejecting the District Court's finding, supported by substantial evidence, that the SUNA representatives had failed to make any proposals or counter-proposals for a settlement, ignoring its finding that these representatives had failed to submit the National Mediation Board's arbitration proposal to its members, and concluding that the SUNA committee's refusal to recommend the proposed settlement based on the Emergency Board report was without significance.

Reasons for Granting the Writ

1. This Court should determine the ever recurring question whether the Norris-La Guardia Act precludes the

issuance of injunctive relief to enforce the Railway Labor Act in major labor disputes. The court below considered that the question has "simply not been determined by the Supreme Court" (App. A, p. 39). This issue alone is so significant as to warrant certiorari. See Comment, "Enjoining Strikes and Maintaining the Status Quo in Railway Labor Disputes," 60 Columbia L. Rev. 381 (1960).

2. The decision of the Court of Appeals respecting the issuance of a preliminary injunction to preserve the *status quo* in an action brought to enforce compliance with the Railway Labor Act is squarely in conflict with the decisions of the Courts of Appeals for the Third and Eighth Circuits in *Railroad Yardmasters* v. *Pennsylvania R. Co.,* 224 F. 2d 226 (3d Cir., 1955) and *Missouri-Kansas-Texas R. Co.* v. *Randolph,* 182 F. 2d 996 (8th Cir., 1950).

The general rule governing appellate review of a preliminary injunction has been well stated by this same Court of Appeals in *Hamilton Watch Co.* v. *Benrus Watch Co.,* 206 F. 2d 738 (2d Cir., 1953). In that case, the Court stated that a District Court, in granting or denying a preliminary injunction, must resolve two questions:

A. Has the plaintiff raised questions going to the merits which are so serious, substantial, difficult and doubtful as to make them a fair ground for litigation and for more deliberate investigation?

B. Is irreparable harm to the plaintiff likely to result if the injunction is denied which outweighs the harm to defendant likely to result if the injunction is granted?

The appellate court is limited to determining whether, within the framework of these questions, the District Court has abused its discretion. *Hamilton Watch Co.* v. *Benrus Watch Co., supra; Mytinger & Casselberry, Inc.* v.

Numanna Lab. Corp., 215 F. 2d 382 (7th Cir., 1954). Under this standard, the Court of Appeals in this case would have been required to affirm the District Court's action. It neither contested the District Court's determination that the complaint below raised serious, substantial, difficult and doubtful questions going to the "merits" which provided a "fair ground for litigation," nor the District Court's "balancing of the hardships."[4]

The Court of Appeals held, however, that this "general rule as to the scope of review of temporary injunctions" was inapplicable where the party resisting the injunction made "a claim that such an injunction transgresses the command of § 4 of the Norris-La Guardia Act." It held that in such a case, the plaintiffs "had the burden of showing, as a matter of law, that the broad command of § 4 is subject to an exception when a Union has violated its duties under the Railway Labor Act and, as a matter of fact, that the defendant here had done that" (App. A, p. 49). In short, the Court held that a preliminary injunction could issue only if the tests justifying a permanent injunction were met!

This holding is neither good law nor good sense. Its effect is to eliminate preliminary injunctions from this field—a result not justified by statute, by precedent, or by reason.

In *Railroad Yardmasters* v. *Pennsylvania R. Co.*, 224 F. 2d 226 (3d Cir., 1955), the Third Circuit decided to the contrary. There a railroad labor organization obtained a preliminary injunction against a carrier in a labor dispute notwithstanding the carrier's claim that such relief was

[4] The pay increases approved by the Emergency Board are retroactively available to SUNA's members (S.A. 138).

barred by the Norris-La Guardia Act.[5] The Court of Appeals, affirming, held:

> "We are now reviewing the propriety of the issuance of a preliminary injunction. At this stage, we are concerned only to find out if the Union 'has . . . raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation.' Hamilton Watch Co. v. Benrus Watch Co., supra at page 740. Where, as here, the harm to the Railroad from the injunction can be adequately measured in dollars, while the harm to the Union if the injunction is refused is irreparable, the raising of the substantial and serious doubts is at least sufficient to justify the issuance of a temporary injunction." 224 F. 2d at 229.

Similarly, in another labor dipute, where a union's officers and individual employees obtained a temporary injunction against a railroad and a rival union, the Eighth Circuit, affirming, stated:

> "A temporary injunction is usually issued to preserve the status quo until a hearing on the merits may be had. It does not involve the merits of the action and an application for a temporary injunction is addressed to the discretion of the trial court and not to the discretion of the appellate court." *Missouri-Kansas-Texas R. Co.* v. *Randolph,* 182 F. 2d 996, 999. See also *Missouri-Kansas-Texas R. Co.* v. *Brotherhood of Ry. Clerks,* 188 F. 2d 302, 306 (7th Cir., 1951).

The action of the Court of Appeals in this case is clearly in conflict with these decisions. Furthermore, this Court has recently held that in a minor dispute under the Rail-

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[5] Section 1 of the Norris-La Guardia Act (29 U. S. C. § 101) withdraws jurisdiction to issue injunctions wherever that Act applies and is of course not just operative with respect to strikes. Since the Norris-La Guardia Act was intended as a two-way street (see S. Rep. No. 163, 72d Cong., 1st Sess., p. 19 (1932)), it was not confined to injunctions against strikes.

way Labor Act a district court may impose equitable conditions to preserve the *status quo* without any determination of the merits when irreparable injury is threatened by a change in operations. *Brotherhood of Locomotive Engineers* v. *Missouri-Kansas-Texas R. Co.*, 363 U.S. 528; *United Railroad Workers* v. *Baltimore & Ohio R. Co.*, 364 U. S. 278.

There is no sound reason why the general equitable principles governing preliminary injunctions should be abandoned merely because the party resisting the injunction relies upon the Norris-La Guardia Act. The party seeking the injunction in a case such as this is seeking to enforce compliance with the Railway Labor Act, and this Court has clearly stated that these two statutes are of coordinate importance. *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana R. R. Co.*, 353 U. S. 30, 39, 40. When a strike against a railroad is threatened and there is a substantial question of its legality under the Railway Labor Act, courts have customarily preserved the *status quo* by issuing temporary injunctive relief against the strike until the issues can be finally determined. See *Chicago, Milwaukee R. Co.* v. *Brotherhood of Railroad Trainmen*, 48 LRRM 2071 (E.D. Wis., 1961); *Pennsylvania R. Co.* v. *Transport Workers Union*, 178 F. Supp. 30 (E.D. Pa., 1957); cf. *Chicago & N. W. R. Co.* v. *Order of R. Telegraphers*, 264 F. 2d 254, 256 (7th Cir., 1959), reversed on other grounds, 362 U. S. 330; *Chicago River & Indiana R. Co.* v. *Brotherhood of Railroad Trainmen*, 229 F. 2d 926, 928 (7th Cir., 1956), affirmed, 353 U. S. 30.[6]

[6] In the last two cited cases, even though the District Court was of the opinion that the strikes were legal, injunctions were granted pending appeal. In the *North Western* case this Court, although holding that the strike there could not be permanently enjoined, refused to pass on the organization's claim that the injunction pending appeal was invalid. 362 U. S. 330, 342.

Because of the nature of railroad operations and the public need for their service, Congress has enacted the Railway Labor Act "to avoid any interruption to commerce or to the operation of any carrier engaged therein" and to provide a means "for the prompt and orderly settlement of all disputes concerning rates of pay, rules or working conditions" (§ 2, 45 U.S.C. § 151a). Interruptions of service which violate this Act defeat this purpose.

Clearly, as in this case, complaints charging a violation of the Railway Labor Act may raise serious and doubtful questions which can be resolved only after a hearing on the merits. *Mount* v. *Grand International Brotherhood*, 226 F. 2d 604 (6th Cir., 1955). If preliminary relief cannot be secured to permit orderly consideration of such questions, the alternatives are a hasty and ill-considered resolution of the issues, assuming a prompt hearing can be obtained, or a denial of relief until after the threatened conduct has been carried out. If temporary relief is withheld, a party injured by a violation of the Railway Labor Act often cannot be made whole in any realistic sense. Cf. *Brotherhood of Locomotive Engineers* v. *Missouri-Kansas-Texas R. Co.*, 363 U. S. 528, 534. Indeed, irreparable injury is a prerequisite to relief under any standard.

The rule which the Court of Appeals would apply to cases arising under the Railway Labor Act is far more stringent than that which applies to injunctions in labor disputes governed by the National Labor Relations Act. That Act provides for preliminary injunctions against strikes alleged to violate certain provisions of the statute. Section 10(1), 29 U. S. C. 160(1). District Courts are given wide discretion in issuing such injunctions. They need not find that the charges of an unfair labor practice are true; they need only consider whether the petitioner has "reasonable cause to believe" the Act is being violated. On an

appeal from such a preliminary injunction under the National Labor Relations Act, the reviewing court "is limited to the question whether the District Court was or was not reasonable in concluding the [petitioner] has cause to believe that the charges were true." *Douds* v. *Milk Drivers Union*, 248 F. 2d 534, 537 (2d Cir., 1957); see *Cosentino* v. *United Brotherhood of Carpenters*, 265 F. 2d 327 (7th Cir., 1959); *Retail Wholesale & Dept. Store Union* v. *Rains*, 266 F. 2d 503 (5th Cir., 1959). *Schauffler* v. *Local 1291, ILA*, 48 LRRM 2434 (3d Cir., 1961).

Even when a temporary injunction is sought under Section 10(j) of the National Labor Relations Act (29 U. S. C. § 160(j)), which does not specify the same governing standard as Section 10(l), courts have applied a similar test. In *Douds* v. *International Longshoremen's Association*, 241 F. 2d 278 (2d Cir., 1957), a temporary injunction was granted against a union alleged to have failed to bargain in good faith. Affirming, the court held that the only issue was whether "there is reasonable cause to believe that the certain unfair labor practice stated in the complaint was committed." (p. 285)

In view of the purposes of the Railway Labor Act, the rule adopted by the Court of Appeals cannot be justified. The conflict with the opposing decisions of the Third and Eighth Circuits requires resolution here.

3. The Court of Appeals clearly erred in holding that the Railway Labor Act did not require the parties to a major labor dispute to bargain through representatives authorized to conclude such a dispute in conference. On the basis of this erroneous construction of the statute, it improperly rejected petitioners' claim that respondents had violated the Railway Labor Act by depriving their representatives of all authority to agree to a settlement

resulting from negotiation, mediation, or Emergency Board proceedings.

The Court of Appeals' holding is plainly contrary to the express language of the statute, to decisions of this Court, to the legislative history of the Act, and to the interpretation of the Act made by those affected by it and by the administrative agency most concerned with its implementation.

Thus Section 2 First of the Act (45 U. S. C. § 152 First) requires carriers and their employees "to make every reasonable effort to make and maintain [collective bargaining] agreements. . . ." Section 2 Second (45 U. S. C. § 152 Second) provides that "All disputes . . . shall be considered and, if possible, *decided*, with all expedition, *in conference* between representatives designated and authorized so to confer. . . ." (emphasis supplied). The Court of Appeals held that these provisions required no more than that the representatives be authorized to confer (App. A, p. 43), relying primarily on its determination that under the entirely different provisions of the National Labor Relations Act, bargaining representatives need not be given authority to decide disputes.

But if all disputes are to be not only "considered" but also "decided . . . in conference," plainly representatives "authorized *so to confer*" must have authority not merely to talk, but to decide and to conclude the dispute whenever an agreement acceptable to those representatives can be reached by the conferees. As the Court stated in *Elgin, Joliet & Eastern R. Co.* v. *Burley*, 325 U. S. 711, 728-729:

> "The statute [the Railway Labor Act] itself vests exclusive authority to negotiate *and to conclude* agreements concerning major disputes in the duly selected collective agent. . . . Since the entire statutory procedure for settling major disputes is aimed only at

> securing agreement and not decision, unless the parties agree to arbitration, this exclusive authority includes representation of the employees not only in the stage of conference, but also in the later ones of mediation, arbitration, and conciliation." (Emphasis supplied.)

This is necessarily so. Only this past Term, this Court, reviewing the role of railroad labor unions under the Railway Labor Act, noted that a "primary purpose" of the Railway Labor Act of 1934 "was to strengthen the position of labor organizations . . . to the end of furthering the basic congressional policy of self-adjustment of the industry's labor problems between carrier organizations and *effective* labor organizations." In order to make labor unions "effective," not only were carriers prohibited from interfering with their organization and compelled to bargain with them, but minority members of a craft of railroad workers were deprived of the right to choose their own representative or to bargain for themselves. *International Machinists* v. *Street*, 81 S.Ct. 1784, 1795. (Emphasis supplied.) Congress gave unions "powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents." *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192, 202. These powers in major disputes do not rest on the consent of individual employees, but are derived from the Railway Labor Act itself. As this Court has stated, a carrier need look no "further than the Act's provisions to ascertain the union's authority." *Elgin, J. & E. R. Co.* v. *Burley*, 325 U. S. 711, 740.

Employees have the right under the Railway Labor Act to determine who shall be their representative for the purposes of the statute. Section 2 Fourth, 45 U. S. C. § 152 Fourth. But the authority of the representative so chosen is derived from the statute alone. The Railway Labor Act is violated when, as here, employees attempt to take away

the statutory authority of their representative. The very limited function left to SUNA under its constitution and practice is totally inconsistent with the powers granted "authorized representatives" by the Act. Railway Labor Act, §§ 2 Second, 2 Ninth, 45 U. S. C. § 152 Second, 152 Ninth. Since the "collective agent's *power to act* in the various stages of the statutory procedures is part of those procedures and necessarily is related to them in function, scope and purpose" (*Elgin, J. & E. R. Co.* v. *Burley*, 325 U. S. 711, 728), fulfillment of the statutory procedures is made impossible by a constitutional provision such as respondents'.

As already noted, the court below held, however, that the language of Section 2 Second of the Railway Labor Act (45 U. S. C. § 152 Second) required only that representatives be authorized "to confer." If this means negotiators meet just to talk, the statutory requirement that they be *"authorized"* to engage in such idle conversation appears meaningless. The "representatives" of which Section 2 Second speaks are by statutory definition persons designated "to act for" the parties. Section 1 Sixth, 45 U. S. C. § 151 Sixth. Under Section 2 Second disputes must be *"decided,* with all expedition, in conference" if possible. Of course, if the negotiators can not agree, it is not possible to decide in conference. But under SUNA's constitution and practice it is *never* possible to decide a dispute in conference, whether or not the representatives of the parties purport to agree. Nor can disputes be settled "with all expedition" under SUNA's constitution. See *infra*, pp. 22-24.

The requirement of Section 2 First that the parties "exert every reasonable effort" to settle disputes must also be considered. The Court of Appeals seemed to think this question depended mainly on the position of the parties on

the merits of a wage controversy (App. A, 41). In view of the long tradition of uniform national wage progress in the railroad industry, Emergency Board No. 131 considered that respondents are unreasonable in demanding higher wages than are received by employees doing the same work who are represented by a rival organization. But petitioners' complaint against SUNA does not rest on this fact. Whether or not good faith "required the switchmen to abandon all efforts to correct what they deemed to be an inequity" (App. A, 48) is beside the point. The issue is rather whether SUNA's constitution and the respondents' actions under it imposed an unreasonable obstacle to agreement on any terms. This question requires a consideration of the practical difficulties raised by respondents' procedure in bargaining.

When the 1926 Railway Labor Act was being considered, Mr. Donald Richberg, representing SUNA and 19 other railroad unions, told Congress that the Act provided for "agreement, the product of conferences, through representatives of the parties." (Hearings on H. R. 7180 before the Committee on Interstate and Foreign Commerce, 69th Cong., 1st Sess., pp. 11-12 (1926).) The 1920 Act also provided that disputes should be "decided in conference." See *In re International Association of Machinists*, 2 R. L. B. 87 (1921). The Railroad Labor Board (quoted in 39 Mich. L. Rev. at 1073) subsequently stated that the negotiation of railroad labor agreements "is analogous to the representative method that prevails in our governmental system in this country. The employees must be left free to select their representatives and these representatives are charged with the duty of negotiating and *agreeing* for the employees" (emphasis supplied).

As the record herein shows, the railroads have considered the Act to require them to vest the power to conclude dis-

putes in their representatives, and have in fact done so (S. A. 86, 136-137), as have virtually all railroad unions other than SUNA (S. A. 142-143). SUNA itself did not adopt the constitutional provisions limiting its representatives' authority until 1955—29 years after the passage of the Railway Labor Act (S. A. 122-123).

And, in this case, the United States, at the request of the National Mediation Board, appeared as *amicus curiae*, stating:

> "The restrictions placed upon such representatives of the defendant Union, which was certified as the bargaining agent for the employees 'are inconsistent with the provisions of the Railway Labor Act, defeat the purpose of the Act and make its administration cumbersome and ineffective.'" (C. A. 7-8.)

In the face of all this, the Court of Appeals' decision that representatives of the parties to a major dispute in the railroad industry need be authorized only to "confer" is plainly erroneous. If this decision is allowed to stand, collective bargaining in the railroad industry, as it has been conducted for forty years, will be at an end. At least one major railroad has already announced that if unions are to be permitted to send representatives to the conference table who have no authority to act, it will withdraw the authority it has heretofore given to its representatives (S. A. 137-138). As the Railroad Labor Board noted, in this industry at least, an attempt to conduct collective bargaining negotiations through representatives without power to act can lead only to "trouble and confusion." 39 Mich. L. Rev. at 1073. Indeed, in the present dispute, the National Mediation Board has attributed the failure to reach agreement to the lack of authority of SUNA's committee (C. A. 10).

Congress has dictated that disputes in this industry shall be "decided," if at all possible, "in conference" between

"authorized" representatives of labor and management (45 U. S. C. § 152 Second). The Court of Appeals has made it possible for each side to flout that statutory command by disabling its representatives from deciding any dispute in conference. Plainly, such a result cannot be countenanced.

4. The Railway Labor Act was enacted to prevent interruptions of commerce and of the operations of railroads caused by labor disputes (§ 2, 45 U. S. C. § 151a). To accomplish this end, Congress not only established procedures for the "prompt and orderly settlement" of major disputes, it also imposed upon both carriers and their employees the mandatory duty "to exert every reasonable effort . . . to settle all disputes (45 U. S. C. § 152 First).

To permit a railroad union to stop the operations of seventeen railroads and deprive the public of their services on the more than 30,000 miles of railroad which they operate, where that union has conducted itself as SUNA has in this dispute, makes a mockery of that Congressional command.

This Court has held that the Norris-La Guardia Act is no bar to injunctions issued to enforce the policy and the mandatory commands of the Railway Labor Act. *Virginian R. Co.* v. *System Federation No. 40,* 300 U. S. 515, 562-563; *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana R. R. Co.,* 353 U. S. 30.

Whether or not the limitations imposed on SUNA's representatives by its constitution, standing alone, violated the Railway Labor Act, plainly SUNA's total conduct did. As the District Court found, SUNA sent representatives to the bargaining table who had no authority to act, SUNA's committee refused to permit its members even to consider arbitration, it made no offers to compromise, and, when the railroads offered a compromise accepted by the balance of

the industry's employees and recommended by a Presidential Emergency Board, it purported to agree, but in fact refused even to recommend its acceptance (S. A. 166-167). Clearly, this conduct frustrated the intent of the Act (S. A. 173).

The extent to which SUNA failed to exert "every reasonable effort" is exemplified by the testimony of its president (S. A. 127). Although under the SUNA constitution, only the membership could authorize a binding offer or accept an offer made to them, he testified as follows:

> "Q. Have you submitted any ideas concerning settlement of this dispute to the members since they rejected the Emergency report?
>
> "A. No, I have no reason, I figure, without a firm offer.
>
> "Q. You just testified to me you did.
>
> "A. That I received a suggestion. We do not submit suggestions.
>
> "Q. Have you polled any of your men what they would take to settle this dispute?
>
> "A. We have not.
>
> "Q. You never asked them?
>
> "A. No, we have no provisions for polling the membership to find out what they would do."

Again, as in the case of the Mediation Board's proffer of arbitration, when the railroads made a further offer, SUNA refused to submit it to its members for a vote (S. A. 155).

All that SUNA has done is to go through the motions of negotiating. As the District Court held, ". . . the duty to negotiate involves not merely the obligation to observe the form of negotiation, but also the duty to negotiate in good faith" (S. A. 173). If that duty is not enforced, the Railway

Labor Act, like SUNA's purported compliance with it, becomes merely an empty gesture.

5. The Court of Appeals violated the restrictions upon its power to set aside findings of fact made by the District Court imposed by Rule 52(a) of the Federal Rules of Civil Procedure.

Rule 52(a) provides:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses."

In setting aside the District Court's findings that respondents had failed to bargain in good faith, and its additional finding that respondents had made no proposals or counter-proposals for settlement of the dispute, the Court of Appeals contravened the prohibitions of this rule. Although the Court of Appeals used the magic words "clearly erroneous," the record makes it plain that in fact it simply disagreed with the District Court as to the weight of the evidence. As this Court has held, ". . . a choice between two permissible views of the weight of the evidence is not 'clearly erroneous.'" *United States* v. *Yellow Cab Co.*, 338 U. S. 338, 342.

With respect to the District Court's finding that respondents at no time "offered to enter into any agreement or agreements in settlement" of the dispute other than their original demand (S. A. 167), and the statement in its opinion that respondents in fact refrained "from presenting specific proposals or counter-proposals on behalf of the union," the Court of Appeals stated:

> "The evidence makes it clear that the Union negotiators . . . in fact . . . did make other proposals subject to . . . ratification [by the membership]." (App. A, p. 48, note 5.)

The "evidence" upon which it relied, however, was the testimony of the Union president (S. A. 105-136). It ignored the testimony of both railroad witnesses. Thus Mr. Mallery testified as follows (C. A. 5):

> "Q. During these negotiations, Mr. Mallery, did the Switchmen's Union ever make an offer subject to ratification by their members?
>
> A. No, sir, other than their original offer."

Likewise, Mr. Herdman testified on cross-examination (S. A. 159):

> "Q. You have given them no firm offer in lieu of wages?
>
> A. We have no offer from them and no proposals other than the original."

Accepting the Court of Appeals' construction of the SUNA witness' testimony, this direct conflict of testimony presents a question of credibility. That question was for the District Court:

> "'Face to face with living witnesses the original trier of the facts holds a position of advantage from which appellate judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth. . . . How can we say the judge is wrong? We never saw the witnesses. . . . To the sophistication and sagacity of the trial judge the law confides the duty of appraisal.' *Boyd* v. *Boyd*, 252 N. Y. 422, 429, 169 N. E. 632, 634." *United States* v. *Oregon Med. Soc.*, 343 U. S. 326, 339.

The District Court had the right to believe Mr. Mallery and Mr. Herdman and to disbelieve the SUNA witness, and Rule 52(a) makes its choice final.

Similarly, with respect to the District Court's determination that respondents failed to bargain in good faith, the Court of Appeals substituted its judgment of the evidence for that of the District Court. Thus, since it found that the Railway Labor Act did not require that representatives be authorized to decide, it gave no weight to the lack of authority of SUNA's representatives. But even under the lesser standards of the National Labor Relations Act, the lack of authority of negotiators is *evidence* of lack of good faith and may be determinative. *E.g., National Labor Relations Board* v. *Hibbard,* 273 F. 2d 565 (7th Cir., 1960); *Standard Generator Service Co.,* 90 NLRB 790 (1950), affirmed, 186 F. 2d 606 (8th Cir., 1951; cf. *National Labor Relations Board* v. *Darlington Veneer Co.,* 236 F. 2d 85, 88 (4th Cir., 1956).

In an opinion by Judge Parker, the refusal or failure either to accept an offer or make a counter-proposal has been expressly held to show lack of good faith under the Railway Labor Act. *Brotherhood of Railway and Steamship Clerks* v. *Atlantic Coast Line R. Co.,* 201 F. 2d 36, 40 (4th Cir., 1953), certiorari denied, 345 U. S. 992. Thus the decision below also presents a conflict on this point.

In addition to these factors, the District Court also made unchallenged findings that, although they could have done so, SUNA's representatives refused to present the Mediation Board's proffer of arbitration to the membership for consideration (S. A. 166), and, having purportedly agreed to a settlement based on the Emergency Board's proposals, refused even to recommend its adoption by the membership (S. A. 166-167).

While the Court of Appeals attached no significance to any of these matters, the District Court did (S. A. 171-173). "Good faith" is essentially a question of intent. As this

Court stated in *United States* v. *Yellow Cab Co.*, 338 U. S. 338-341:

> "Findings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them."

It was the District Court, and not the Court of Appeals, which saw and heard SUNA's president and the railroads' negotiators. Even if the Court of Appeals might have reached a different conclusion, had it been the trier of fact, it cannot on this record set aside the District Court's findings. Those findings require affirmance of the preliminary injunction and reversal of the judgment of the Court of Appeals.

Conclusion

This Court should determine whether injunctions may issue to enforce the Railway Labor Act in major labor disputes. This question alone is of such paramount importance as to justify review here. The exceptional standard for reviewing preliminary railroad labor injunctions adopted by the Court of Appeals, which would require a plaintiff to prove its case on the merits, conflicts with decisions of the Third and Eighth Circuits. In effect, though not in terms, this standard is a denial of preliminary relief in such cases. Unless reversed, the erroneous conclusion below that under the Railway Labor Act a union need not authorize its bargaining representatives to "decide" disputes "in conference" will cause havoc in railroad labor relations. As recognized by the National Mediation Board, this holding will defeat the purposes of the Railway Labor Act. The holding that respondents bargained in good faith under the Railway Labor Act even though they failed either to accept petitioners' offer or make a counter-proposal is in conflict with a decision of the Fourth Circuit. In addition to the foregoing errors, the court of appeals completely

ignored the requirements of Rule 52(a) of the Federal Rules of Civil Procedure.

It is implicit in its opinion that the Court of Appeals, in deciding this case, chose the course it did because it considered that the ultimate merits of this controversy presented a "hard case" (App. A., pp. 40-41). Like the proverbial "hard case," this one has made bad law. For all of the foregoing reasons, a writ of certiorari should issue.

Respectfully submitted,

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July 1961.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 387—October Term, 1960.

(Argued May 12, 1961 Decided June 9, 1961.)

Docket No. 26739

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *et al.*,

Plaintiffs-Appellees,

—v.—

SWITCHMEN'S UNION OF NORTH AMERICA, *et al.*,

Defendants-Appellants.

Before:

FRIENDLY and SMITH, *Circuit Judges,* and WATKINS, *District Judge.**

Appeal from an order of the District Court for the Western District of New York, John O. Henderson, *Judge,* issued a temporary injunction against a strike. Reversed.

LEE LEIBIK, Chicago, Ill. (Ruth Weyand, Washington, D. C. on the brief), *for Defendants-Appellants.*

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* United States District Judge for the Northern and Southern Districts of West Virginia, sitting by designation.

RICHARD J. FLYNN (Sidley, Austin, Burgess & Smith and Howard Neitzert, Chicago, Ill. and John E. Leach, Buffalo, N. Y. on the brief), *for Plaintiffs-Appellees.*

FRANCIS R. CURRY, Reilly, Curry & Gibbons, New York, N. Y., CLARENCE M. MULHOLLAND, Mulholland, Robie & Hickey, Washington, D. C., EDWARD J. HICKEY, JR. and JAMES L. HIGHSAW, JR., Washington, D. C., *for Railway Labor Executives Association as Amicus Curiae.*

FRIENDLY, *Circuit Judge*:

This appeal raises important questions as to the interrelations of the Railway Labor Act, 45 U. S. C. §§ 151 ff., and the Norris-La Guardia Act, 29 U. S. C. §§ 101 ff.

The appeal, brought under 28 U. S. C. § 1292(a), is by the Switchmen's Union, whose principal office is in Buffalo, and certain of its officers, from an order of the District Court for the Western District of New York granting a motion of appellee railways, operating primarily in western states, for a temporary injunction against a strike. The strike threat grew out of a "major" labor dispute over rates of pay. The dispute had progressed through all the stages provided for in the Railway Labor Act, including the expiration of thirty days after a report by an Emergency Board to the President as provided in § 10.

After a two day hearing, the District Court found that "At no time since the services of the notices of March 2 and March 20, 1959, have the defendants or any representatives of the defendants engaged in good faith efforts to reach final agreement with the Western Carriers' Conference Committee," with certain exceptions, and that "There

are serious, substantial, difficult, and doubtful questions going to the merits of this case as to whether" defendants had complied with their statutory obligations to that end, imposed by § 2 First and Second of the Railway Labor Act. The Court found also, as is not denied, that a strike by the switchmen would cause irreparable injury to the plaintiff railways, as well as serious damage to the public and to other railway employees.

Appellants assert the injunction went beyond the Court's "jurisdiction" as limited by the Norris-La Guardia Act, 29 U. S. C. §§ 101-115. Appellees deny this, and contend also that the scope of our review of this temporary injunction is limited to determining whether the District Court abused its discretion in deciding that plaintiffs had raised substantial questions requiring more deliberate investigation and that the harm plaintiffs would suffer from denial of the injunction outweighed any damage to defendants from its grant. Both sides claim their positions to be supported by pertinent decisions of the Supreme Court. The decisions do not speak to us with the clarion (but opposite) effect they do to the parties. Analysis of the statutes and the cases is needed to bring the issue into focus.

The Norris-La Guardia Act of 1932 divides injunctive orders in labor disputes into two categories. Section 4 is a flat prohibition of certain types of injunctive orders—or, more accurately, it would be if Norris-La Guardia were to be read alone. Among these are orders against "(a) Ceasing or refusing to perform any work or to remain in any relation of employment"; "(g) Advising or notifying any person of an intention to do any of the acts heretofore specified"; "(h) Agreeing with other persons to do or not to do any of the acts heretofore specified"; and "(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified." Signifi-

cantly, § 4 includes not only temporary and permanent injunctions but temporary restraining orders as well. Although § 4 alone would seem clear enough, § 5 adds that no court of the United States "shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in" § 4.

However, the list of prohibited orders in § 4 is far from being a complete catalogue of all the injunctive orders issuable in labor disputes. As to these others, § 7 imposes not a prohibition but limitations; the court shall not issue "a temporary or permanent injunction in any case involving or growing out of a labor dispute" except after hearing testimony in open court and unless the court makes specified findings, of which that most directly pertinent here is:

> "(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, • • • "

If substantiation of the distinction between the two sections were needed, the legislative history would furnish it in ample measure.[1]

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[1] Senator Blaine said the bill "limits this jurisdiction [of federal equity courts] both with reference to the situations in which injunctions may be issued and the procedure which must be followed." 75 Cong. Rec. 4626 (1932). As for § 4, he declared that "it provides among other things that the Federal courts are prohibited from issuing any injunctions enjoining workmen from striking, or from making their strike effective by peaceful means." The right to strike includes the right to seek the advice of union officials, to receive strike benefits, and to publicize the facts in any peaceful manner; he referred to these rights "and everything else which sections 4 and 5 provide shall not be prohibited in any injunction involving or growing out of a labor dispute issued by any Federal court • • • In addition to these provisions relating to the content of injunctions this bill in section 7 sets forth the procedure to be fol-

Six years earlier Congress had enacted the Railway Labor Act of 1926, c. 347, 44 Stat. 577. This contained, *inter alia,* the provisions for settlement of disputes by agreement mentioned above (§ 2), and also provisions for boards of adjustment "to hear and, if possible, decide" minor disputes[2] which the carriers and employees had agreed to refer (§ 3), for invocation of the services of a Board of Mediation (§§ 4, 5), and for the Presidential appointment of an Emergency Board (§ 10).

The debates on the Norris-La Guardia Act indicate concern over its interrelation with the earlier Railway Labor Act. Representative Beck of Pennsylvania offered an amendment that would have excluded from Norris-La Guardia labor disputes involving the suspension or discontinuance of a public utility whose operation was essential to property, health and life (75 Cong. Rec. 5503). The amendment was defeated, 75 Cong. Rec. 5505; but only on assurance from Representative La Guardia that, at least

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lowed in labor injunction cases." *Id.* at 4629. Representative La Guardia echoed this approach, at 5479, noting that the bill bars injunctions without a hearing on testimony, and also bars injunctions against lawful acts. The Senate Committee report affords further confirmation of the distinction. It notes, and Senator Norris said substantially the same thing on the floor, 75 Cong. Rec. 4505-10, that injunctions depriving workers of the right to assemble, picket, strike, and the like were "indefensible" and declares that "the bill, under section 4, takes away from all Federal courts the power to issue such injunctions." 72d Cong., 1st Sess., S. Rep. No. 163, p. 17. Section 7 was separately discussed as "procedure." *Id.,* p. 21. Opponents, such as Representative Beck of Pennsylvania, were equally convinced that sections 4 and 5 were absolutes, forbidding any and all injunctions against strikes or other enumerated activities. 75 Cong. Rec. 5471-72, 5474, 5500.

[2] "Minor" disputes, § 3, are those "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions * * *" "Major" disputes include those arising during bargaining for a new contract. *Brotherhood of R.R. Trainmen* v. *Chicago River & Indiana R. Co.,* 353 U. S. 30, 33 (1957).

as to railroads, it was unnecessary, since the Railway Labor Act "provides every detail for the settlement of disputes" and "The workers could not and would not think of going on strike before all the remedies provided in the law have been exhausted" (75 Cong. Rec. 5504).

Two years after the Norris-La Guardia Act, Congress, in 1934, reenacted the Railway Labor Act with important amendments, c. 691, 48 Stat. 1185. Especially significant for understanding the Supreme Court decisions relied on by the parties were the addition of § 2 Ninth, providing for the National Mediation Board to certify the authorized representative of a class or craft of employees and requiring a carrier to treat with the representative so certified, and extensive amendment of § 3 giving either party the right to refer minor disputes to the Adjustment Board, § 3 First (i), and making the awards of the Board in such disputes "final and binding upon both parties to the dispute * * *," § 3 First (m).

Texas and N. O. R. Co. v. *Brotherhood of Railway Clerks,* 281 U. S. 548 (1930), the initial Supreme Court decision involving an injunction to enforce the Railway Labor Act, antedated Norris-La Guardia. Such bearing as it has on the present controversy comes from the statement of Chief Justice Hughes, as a step in reaching the Court's conclusion, that the prohibition of § 10 against changes "in the conditions out of which the dispute arose," during study by and for thirty days after the report of an Emergency Board, "manifestly imports a legal obligation," which, as insisted by counsel for the Brotherhood, who had represented principal railway labor organizations at the hearings on the Railway Labor Act, authorized "any court of competent jurisdiction to restrain either party to the controversy from changing the existing status" during the period, 281 U. S. at 565-566.

Virginian Ry. Co. v. *System Federation No. 40,* 300 U. S. 515 (1937), came after Norris-La Guardia, and after the 1934 amendment of the Railway Labor Act as well. As in the *Texas and New Orleans* case, the injunction was against the carrier, its principal thrust being a direction to bargain with a union designated by the Mediation Board under § 2 Ninth. No contention was or could have been made that this portion of the injunction violated § 4 of Norris-La Guardia; the only Norris-La Guardia contention specifically mentioned in the Supreme Court's opinion was one under § 9, which limits an injunction to "a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint * * * and as shall be expressly included in * * * findings of fact made and filed by the court * * * " The Supreme Court deemed it "unnecessary to comment on other similar objections, except to say that they are based on strained and unnatural construction of the words of the Norris-La Guardia Act. * * * " Examination of the briefs shows these objections included alleged violations of § 7(a) for lack of proof of "unlawful acts" and also of § 4(e), which prohibits injunctions against peaceful publicizing of a labor dispute, but the claim that the injunction had done the latter was scarcely made out. Mr. Justice Stone disposed of all Norris-La Guardia objections by saying "It suffices to say that the Norris-La Guardia Act can affect the present decree only so far as its provisions are found not to conflict with those of § 2, Ninth, of the Railway Labor Act, authorizing the relief which has been granted. Such provisions cannot be rendered nugatory by the earlier and more general provisions of the Norris-La Guardia Act," 300 U. S. at 562-563. This language affords much opportunity for spinning gossamer. It could be read to mean that Norris-La Guardia is wholly inapplicable to a controversy arising solely under a provision added to the Railway Labor Act in 1934; such a construction would raise the ques-

tion whether, as to controversies under provisions of the 1926 Act that were reenacted in 1934, Norris-La Guardia applied fully or not at all. A more reasonable interpretation, at least as regards the contention under § 7 of Norris-La Guardia, is that the carrier's disobedience of § 2 Ninth constituted "unlawful acts" within § 7(a) and hence justified the injunction as the District Court had held, 11 F. Supp. 621 (E. D. Va. 1935), affd. 84 F. 2d 641 (4 Cir. 1936).

Brotherhood of Railroad Trainmen v. *Toledo, P. & W. R. Co.*, 321 U. S. 50 (1944), held that an injunction against violence during a strike, of the sort permitted by §§ 4 and 7 of Norris-La Guardia, should have been denied, under § 8 of that Act, by reason of the plaintiff's failure to make reasonable efforts at settlement. Its chief significance for present purposes lies in its being the first case in which the Norris-La Guardia Act was applied by the Court to support denial of an injunction in a railroad labor controversy, 321 U. S. at 57-60.

There follow a group of cases dealing with racial discrimination by unions. *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192 (1944), came before the Court on certiorari to the Supreme Court of Alabama; hence no Norris-La Guardia problem could have been in the Court's mind when it used the broad language that it did, at p. 207, concerning the judicial enforcement of rights under the Railway Labor Act. Examination of the briefs in the companion case, *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U. S. 210 (1944), which came from the Fourth Circuit, shows that defendant there made no Norris-La Guardia contention and nothing specific was said on the subject in the Supreme Court's opinion. In *Graham* v. *Brotherhood of Firemen*, 338 U. S. 232, 238-39 (1949), objection as to lack of the findings of unlawful action demanded by § 7 of Norris-La Guardia was vigorously

pressed. The Court disposed of this on the basis that the *Steele* and *Tunstall* cases had settled "that the Railway Labor Act imposes upon the Brotherhood the duty to represent all members of the craft without discrimination and invests a racial minority of the craft with the right to enforce that duty"; that Norris-La Guardia does not "contain anything to suggest that it would deprive these Negro firemen of recourse to equitable relief from illegal discriminatory representation"; and "Conversely there is nothing to suggest that, in enacting the subsequent Railway Labor Act provisions insuring petitioners' rights to nondiscriminatory representation by their bargaining agent, Congress intended to hold out to them an illusory right for which it was denying them a remedy." 338 U. S. at 239-240. In *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U. S. 768 (1952), the issue as to § 7 of Norris-La Guardia was again raised; the Court said it "need add nothing to what was said about inapplicability of that Act in the *Steele* case and in *Graham* v. *Brotherhood of Firemen* • • • " If the *Graham* decision had been rested solely on the first ground mentioned, it would support the proposition that violation of the duties imposed by § 2 of the Railway Labor Act is unlawful action within § 7(a) of Norris-La Guardia; but, as in *Virginian*, the emphasis on the "subsequent" Railway Labor Act[3] creates some doubt whether the holding must be limited to violations of provisions added in 1934. The one thing that is clear is that, as said in *Order of R.R. Telegraphers* v. *C. & N. W. Ry. Co.*, 362 U. S. 330, 338 (1960), "None of these cases • • • enjoined conduct which the Norris-La Guardia Act withdrew from the injunctive

[3] In fact the *Steele* opinion had relied in part on provisions, § 2 Second, Third and what had been Fourth (now with some minor changes Sixth) which had come from the 1926 Act and were reenacted in 1934, and in part on other provisions, § 2 Fourth, Seventh and Ninth, added in 1934, 323 U. S. at 199-200.

power of the federal courts * * * ," although the agreement enjoined in *Brotherhood of Railroad Trainmen* v. *Howard* had been coerced by threat of a strike.

We thus arrive at *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana R. Co.*, 353 U. S. 30 (1957), where the Court sanctioned an anti-strike injunction in a case growing out of a "minor dispute." That case rested upon the view that the provisions of § 3 of the Railway Labor Act, as extensively amended in 1934, providing for what amounts to compulsory settlement of "minor" disputes, established an implied exception to § 4 of Norris-La Guardia. Appellees place heavy reliance on the statements, p. 40, that "the Norris-La Guardia Act cannot be read alone in matters dealing with railway labor disputes" and that "There must be an accommodation of that statute and the Railway Labor Act so that the obvious purpose in the enactment of each is preserved." Appellants counter with fn. 24 on p. 42, which said:

> "The Norris-La Guardia Act has been held to prevent the issuance of an injunction in a railway labor case involving a 'major dispute.' Brotherhood of Railroad Trainmen v. Toledo, P. & W. R. Co., 321 U. S. 50. In such a case, of course, the Railway Labor Act does not provide a process for final decision like that of the Adjustment Board in a 'minor dispute' case."

Since the injunction in the *T. P. & W.* case had been denied, not because the dispute was "major" but because § 8 of Norris-La Guardia prevented issuance of an injunction not prohibited under § 4, we read this as saying, not that there can never be an anti-strike injunction in a major dispute, but that such an injunction can be issued only on a showing, which the Court held to have been made as to "minor" disputes in the *Chicago River* case, that "accommodation" of the two statutes so requires.

The final datum is *Order of R.R. Telegraphers* v. *C. & N. W. Ry. Co., supra.* This establishes that § 4 of Norris-La Guardia is not inapplicable to major railway labor disputes simply because they are railway labor disputes. It is not dispositive here since, on the view of the majority in that case, the union had violated no provision of the Railway Labor Act or, indeed, of any other.

To us this analysis demonstrates that the question whether an anti-strike injunction of the sort banned by § 4 of Norris-La Guardia may be issued in a "major" railway dispute when there has been a violation of the Railway Labor Act and, more particularly, of provisions antedating Norris-La Guardia, has simply not been determined by the Supreme Court. The decisions furnish, not an answer, but data for making one. Considerations arguing for a negative answer are that the *Chicago River* case, the only decision approving an injunction of the sort banned by § 4, involved a "minor" dispute for which compulsory arbitration had been provided and applied a provision postdating Norris-La Guardia, and that *Order of R.R. Telegraphers,* the only decision specifically disapproving an injunction of the sort banned by § 4, involved a "major" dispute. Against this is that in *Chicago River* the Court naturally dealt only with the case before it—to say that an anti-strike injunction can be issued in a "minor" dispute is not to say that such an injunction cannot be issued in a "major" one if the Railway Labor Act is being violated and an injunction against a strike is the only effective remedy; and in the *Telegraphers* case the majority found no Railway Labor Act violation.

A strong case for sustaining an anti-strike injunction under the Railway Labor Act would be that mentioned by Chief Justice Hughes in *Texas & N. O. R. Co.* v. *Brotherhood of Railway Clerks, supra,* at 565-66, namely, a

threatened strike during the period "After the creation of such [Emergency] board and for thirty days after such board has made its report to the President," in which § 10 provides that "no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose." To be sure, such a case would differ from *Chicago River* in being a "major" dispute and in concerning a pre-Norris-La Guardia provision of the Railway Labor Act. However, we should have little doubt that the latter Act, especially in the light of Representative La Guardia's own statements quoted above, does not withdraw a power to enjoin which the Supreme Court, acting in part on representations by the railway unions themselves, had held to be conferred by § 10; when Congress reenacted that section in 1934, it did so with the gloss the Supreme Court had put upon it. Analytically, perhaps an even stronger case would be one governed by the similar "freeze" provision for the thirty day period after the Mediation Board had notified the parties that its mediatory efforts have failed, § 5 First, since this was added in 1934; actually it is hard to suppose the two cases would be differently decided. Slightly further along in the spectrum would be a threatened strike at an earlier date and hence not within either specific prohibition but, at least arguably, impliedly prohibited by the general scheme of the Railway Labor Act and §§ 2 First and Second, 5, 6 and 10. See *American Airlines, Inc.* v. *Air Line Pilots Assn.*, 169 F. Supp. 777, 784, 788-789 (S. D. N. Y. 1958).

Still further along is a case where, as here, the claim is that although the motions specified by the Railway Labor Act were performed, the required spirit was lacking. Appellees argue with force that it is as much a violation of the Railway Labor Act to make only a token effort to comply with its prescribed processes as to strike without

even the pretense; the problem is that issuing an injunction on such a ground inevitably involves the court in some consideration of the labor dispute as bearing on the good faith of the employee representatives—and this without the advance administrative screening provided under the National Labor Relations Act in 29 U. S. C. § 160(a), (b), (h), (i), and (l) and §§ 176-180. We find it unnecessary here either to affirm or to deny that an injunction against a strike may be issued on such a claim, cf. *A. H. Bull S.S. Co.* v. *Seafarers' International Union*, 250 F. 2d 326 (2 Cir. 1957). For, assuming in appellees' favor that jurisdiction to do this is not excluded, both § 4 and § 7 would confine it to a clear case of union failure to comply with obligations under the Railway Labor Act, and the record affords no warrant for finding that in the instant case.

Appellees' claim that it does rests on two grounds: (1) that a provision in the Switchmen's Constitution, adopted in 1955, that "No authority shall exist to settle a general wage and/or rules movement arising from direct negotiation with a carrier or from mediation excepting only after approval by a majority vote of the membership," and a similar provision as to agreements to arbitrate, constitute a *per se* violation of § 2 of the Railway Labor Act; and (2), alternatively, that the combination of these provisions with the evidence as to appellants' conduct shows a violation here.

(1) Appellants have cited a large number of union constitutions with membership ratification requirements, and also texts noting and, in some instances, approving the practice of a referendum. Appellees respond that most of the references are of recent date; that few of the constitutions cited are of railroad unions; that the major railroad unions do not so condition the authority of their repre-

sentatives; that the carriers' representatives have power to conclude; that the railroad industry differs from others both in the more critical effect of a strike on the public interest, as recognized in the Railway Labor Act, and in the large number of unions able to precipitate one; and, finally, that the National Mediation Board has gone on record, in a suggestion made below, that "The restrictions thus placed upon the representatives of employees for whom the Switchmen's Union has been certified as bargaining agent are inconsistent with the provisions of the Railway Labor Act, defeat the purpose of the Act, and make its administration cumbersome and ineffective."

Decisions under the National Labor Relations Act have established that neither the employer nor the employees regulated thereby are required "to be represented in the bargaining negotiations by a person or persons with competent authority to enter into a binding agreement," *Great Southern Trucking Co.* v. *N. L. R. B.*, 127 F. 2d 180, 185 (4 Cir. 1942), cert. denied 317 U. S. 652 (1942); *N. L. R. B.* v. *New Britain Machine Co.*, 210 F. 2d 61, 62 (2 Cir. 1954); *Lloyd A. Fry Roofing Co.* v. *N. L. R. B.*, 216 F. 2d 273, 275-76 (9 Cir. 1954), although lack of such authority is "a factor which should be taken into consideration in order to decide whether the * * * effort to negotiate was really made in good faith," *Great Southern Trucking Co.* v. *N. L. R. B., supra; N. L. R. B.* v. *A. E. Nettleton Co.*, 241 F. 2d 130, 133-34 (2 Cir. 1957). Appellees say the statutory language here is different; to some extent it surely is. The original Labor Relations Act required an employer "to bargain collectively with the representatives of his employees," Act of July 5, 1935, c. 372, § 8(5), 49 Stat. 449, 453, and the Taft-Hartley Act of 1947 imposed a corresponding obligation on labor organizations, § 8(b)(3), and added the definition, in § 8(d), that the obligation is "to

meet at reasonable times and confer in good faith • • • but such obligation does not compel either party to agree to a proposal or require the making of a concession." In contrast, § 2 First of the Railway Labor Act requires the parties to "exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes • • • in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof"; § 2 Second prescribes that all disputes "shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer • • •"; and there are provisions for mediation, arbitration, and emergency boards which have no precise counterparts in the Labor Relations Act. Still we find nothing in all this that says the representatives must be authorized to conclude; indeed § 2 Second says, rather explicitly, that what they must be authorized to do is to confer. Appellees rely on certain language in Mr. Justice Rutledge's opinion for a majority in *Elgin, Joliet & Eastern Ry. Co.* v. *Burley*, 325 U. S. 711 (1945), opinion adhered to on rehearing, 327 U. S. 661 (1946), distinguishing the role of employees' representatives in major disputes from that in grievances, pp. 728-729, 739-740; appellants rely on the decision there that the Railway Labor Act does not require the vesting of authority in the representatives in grievance cases and argue the same must be true for major disputes as well. We do not believe that either the majority or the minority opinion in *Elgin* dealt with the question here presented.

(2) Whether the entire course of appellants' conduct violated the requirements of the Railway Labor Act requires a fuller statement of the dispute than we have yet made. Much of that history is stated in the July 8, 1960

report of the Emergency Board, annexed to the complaint. The dispute began with notices served by the Union on February 21, 1959, and by the carriers on March 20, 1959, under § 6 of the Railway Labor Act; the former demanded a 12% increase and the latter a decrease in rates of pay. After initial conferences with individual carriers, it was agreed to refer the dispute to national handling. Conferences on that basis began September 17, 1959; after three fruitless bargaining sessions, the parties invoked the services of the National Mediation Board. The Mediation Board's efforts proved unsuccessful. After a strike vote and notice of intention to strike, the Board terminated its services and urged the parties to arbitrate under § 7; the carriers accepted the suggestion but the Union negotiators rejected it without submission to the members. On May 23, 1960, the President created Emergency Board 131 to report on the dispute.

Shortly thereafter a "pattern" of settlements in the industry began to emerge, as a result of an arbitration award in a proceeding between the carriers represented by the Eastern, Western and Southeastern Carriers' Conference Committee and the Brotherhood of Locomotive Engineers, a mediation agreement between the railroads and the Order of Railway Conductors and Brakemen, and the report of Emergency Board No. 130 with respect to Non-Operating Employees represented by eleven cooperating railway organizations. Broadly speaking, these provided for incorporating past cost-of-living adjustments into the basic wage and for stipulated wage increases (2% on July 1, 1960, and an additional 2% on March 1, 1961, for the engineers, conductors and brakemen; 5¢ per hour July 1, 1960, and an improved health and welfare program in early 1961 for the non-operating employees). It was then agreed to narrow the issue before Emergency Board

131 to whether "the yard ground service employees • • • should be granted an increase beyond the 'pattern' because of an alleged intra-industry inequity."

The alleged inequity was this: The Switchmen claimed that historically their pay had approximated that of yard and road service operating employees and had considerably exceeded that of other non-operating employees. This situation, they claimed, had been altered, to their detriment, by two factors. Although the basic day rates of the yard service employees had been raised along with those of the road service employees, the latter enjoy a "dual basis" for pay in terms of hours or miles, whichever produces the greater compensation; as a result of the artificially low mileage equated to a day's work, the road service employees can earn a day's pay for much less than a day's work or receive more than a day's pay for only a day's work. On the other side, the preponderance of uniform cents per hour increases had diminished the differential between the non-operating employees and the allegedly more skilled switchmen.

The Emergency Board expressed itself as "convinced of the good faith of the Organization in pressing its 'inequity' case • • •" It thought, however, that the absence of evidence whether the various differentials, or lack of them, were or were not justified, the acceptance of the pattern by organizations representing other employees in yard and local freight service, and the impracticability of correcting in any one year alleged inequities that had grown up over many, combined to require a resolution of the current wage dispute on the same basis as adopted for the Engineers and Conductors, which had later been accepted by the Firemen and the Trainmen.

On July 20, 1960, a fortnight after the Board's report,

the Carriers' Conference Committee and the Union formulated an agreement substantially embodying the recommendations of the Emergency Board. Along with this was a letter providing that if the Union wished "further handling" of "the wage inequity issue," it should give written notice to the carriers; if the parties were then unable to dispose of the issue and "further handling" was desired, the issue was to be submitted to arbitration under the Railway Labor Act. Neither the agreement nor the letter was signed, but the committees representing the Union and the carriers issued a joint statement that they had "reached an agreement on a proposal to be submitted to the membership of the Switchmen's Union of North America for approval, in accordance with the laws of that organization."

A week later, the International President of the Union wrote its Presidents, Secretaries and Local Chairmen. He reviewed the history of the dispute, the position taken by the Union negotiators, the report of the Emergency Board, and the subsequent negotiations; summarized the agreement; called attention to the provisions of the Union Constitution with respect to approval; and requested that balloting be conducted. On August 18, he notified the carriers that the settlement had been rejected, and proposed August 30 for a further conference. The conference achieved nothing, and on September 1 the Union notified the Mediation Board it had set a strike for September 8, later postponed at the Board's request to September 19; further conferences were held. The Union negotiators advanced various suggestions for modifying the agreement in a manner which they thought might make it acceptable to the switchmen. One was for an additional 2.73¢ per hour, approximately a 3% rather than a 2% increase, an amount calculated to produce the same annual increase for the switchmen as had been granted the engineers. When the

carriers rejected this offer,[4] the Union proposed equivalent additions in the form of fringe benefits, evidently in the hope that this might ease the carriers' "pattern" problem. The carriers stood on the July 20 agreement. On September 16 they filed this action and obtained a temporary restraining order, followed by the temporary injunction here under appeal.

We find nothing in this history to show the Union simply went through the motions of bargaining. The controversy was that most intractable of all types of labor disputes—a question of principle. From the carriers' standpoint the Union's refusal to accept the "pattern" was indeed arbitrary, involving not only larger increases to the switchmen than to other crafts but the possibility of a chain reaction. Yet, from the Union's standpoint, acceptance of the "pattern" would continue the very "inequity" of which they were complaining, sincerely so far as the record shows, whether justifiably or not. The carriers say the Union negotiators should at least have recommended the settlement; appellants respond there was nothing wrong in the negotiators' simply putting up to the men whether to take the benefits they had obtained and shelve the inequity issue, or to press the latter even if this meant invoking the ultimate weapon. We should not suppose it to be bad faith for an employer's representatives to report a proposal as the best obtainable without taking a strike but still as something they did not recommend; we see no reason for a different rule as to a union's. The evidence is convincing that after the vote the Union negotiators did not stand on the original demand for a 12% increase; they made suggestions whereby the increases would conform to the Union's ideas

[4] A witness for the carriers testified that if the "three and three per cent" proposal "were applied across the section," it would cost the railroad approximately $100,000,000 "more than the pattern."

of equity even though the total resulting wages still would not.[5] The reasons for the carriers' rejection of these suggestions are understandable, but that does not make the Union's conduct so wholly arbitrary as to pass beyond the bounds of good faith endeavor to reach agreement. Certainly the parties had reached the end of the bargaining road if their conduct were being tested under § 8(d) of the Labor Relations Act—neither would have been compelled "to agree to a proposal" or to make "a concession." See *N. L. R. B.* v. *United Clay Mines Corp.*, 219 F. 2d 120, 125-126 (6 Cir. 1955); Cox, The Duty to Bargain in Good Faith, 71 Harv. L. Rev. 1401, 1412-1422 (1958). Assuming, as we do, that the Railway Labor Act imposes a somewhat greater duty to endeavor to reach agreement, it no more required the switchmen to abandon all efforts to correct what they deemed an inequity than it compelled the carriers to depart from the "pattern" of settlements with other crafts.

Appellees say this does not matter in view of the judge's alternative finding that "There are serious, substantial, difficult, and doubtful questions" on the issue of good faith. They urge that since it is only a temporary injunction we are reviewing, and no one has contested the finding that irreparable damage would flow from its denial, the only point open to review is whether even this alternative finding was clearly erroneous, citing particularly our decision in *Hamilton Watch Co.* v. *Benrus Watch Co.*, 206 F. 2d 738, 740 (2 Cir. 1953), from which the quoted language was evidently taken.

We think this an overly literal reading of *Hamilton* v.

[5] We have not overlooked the carriers' testimony that the Union representatives said on August 30 they had no authority to settle on anything other than their original proposal. The evidence makes it clear that the Union negotiators said only they could settle on no other proposal without going back to the men, and that, in fact, they did make other proposals subject to such ratification.

Benrus; the language quoted from Judge Frank's opinion must be taken along with the beginning of the sentence, "To justify a temporary injunction it is not necessary that the plaintiff's right to a final decision, after a trial be absolutely certain, wholly without doubt," and the statement that the Court could not "possibly" declare the District Court's substantive findings of probable Clayton Act violation to have been clearly erroneous. Here we regard the finding of breach of the Railway Labor Act by the Union as being so on the evidence the judge had before him; *Hamilton* v. *Benrus* does not say it is enough that further evidence might demonstrate it was not. Futhermore, even if the rule of review were as plaintiffs allege, we doubt it would sustain continued enforcement of the temporary injunction when more than seven months have passed since it was issued and plaintiffs have done nothing to bring about a resolution of the questions by the District Judge although, so far as appears, the court has been open for that purpose.[6]

Beyond this, whatever the general rule as to the scope of review of temporary injunctions may be, no such principle as plaintiffs advocate can be applicable to a claim that such an injunction transgresses the command of § 4 of the Norris-La Guardia Act. That section uses the most emphatic words possible—"No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction" against a peaceful strike. To overcome that bar plaintiffs had the burden of showing, as a matter of law, that the broad command of § 4 is subject to an exception when a Union has violated its duties under the Railway Labor Act and, as a matter of fact, that the defendant here had done that. They were

[6] In *Hamilton* v. *Benrus*, the temporary injunction was issued April 27, 1953, 114 F. Supp. 307 (D. Conn. 1953); the appeal was argued June 2 and decided June 30.

obliged to meet that burden, not simply to show they might be able to meet it;[7] until they met it, the court was without power to issue an injunction whether temporary or permanent.[8]

Order reversed.

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[7] We recognize that in *Railroad Yardmasters* v. *Pennsylvania R. Co.*, 224 F. 2d 226 (3 Cir. 1955), the Court used the *Hamilton* v. *Benrus* language in affirming an injunction claimed to violate § 7 of Norris-La Guardia because the evidence did not support the finding required by § 7(a) "That unlawful acts have been threatened and will be committed" etc., which the statute also makes jurisdictional. However, as in *Hamilton* v. *Benrus*, there was no determination by the Court of Appeals that the substantive finding which the District Court had made on the evidence presented, in that case of threatened unlawful action by the railroad, was clearly erroneous. In *M-K-T R. Co.* v. *Brotherhood of Railway & Steamship Clerks*, 188 F. 2d 302, 306 (7 Cir. 1951), cited by appellees as being "to the same effect," there was held to be no "labor dispute" and hence no Norris-La Guardia problem.

[8] The Switchmen here urge that the injunction was also unlawful under § 7, both because violations of the Railway Labor Act are not "unlawful acts" within § 7(a) and because there is no proof of such violations in this case. For reasons pointed out in the text, we think the first proposition scarcely reconcilable with the *Virginian*, *Graham and Howard* cases. The second is very likely so, but our holding as to § 4 is dispositive.

APPENDIX B

Railway Labor Act

§ 1 Sixth (45 U. S. C. § 151 Sixth) provides:

"The term 'representative' means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them."

§ 2 (45 U. S. C. § 151a) provides:

"GENERAL PURPOSES

"(1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions."

§ 2 First (45 U. S. C. § 152 First) provides:

"GENERAL DUTIES

"It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

§ 2 Second (45 U. S. C. § 152 Second) provides:

"All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute."

§ 2 Fourth (45 U. S. C. § 152 Fourth) provides in part:

"Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. * * *"

§ 2 Ninth (45 U. S. C. § 152 Ninth) provides in part:

"If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. * * *"

§ 5 First (45 U. S. C. § 155 First) provides:

"The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

"(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

"(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

"The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

"In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 10 of this Act) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

"If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose."

§ 7 First (45 U. S. C. § 157 First) provides:

"Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not

settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in the manner provided in the preceding sections, such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a board of three (or, if the parties to the controversy so stipulate, of six) persons: *Provided, however,* That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this Act or otherwise."

Norris-La Guardia Act

§ 4 (29 U. S. C. § 104) provides in part:

"No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

"(a) Ceasing or refusing to perform any work or to remain in any relation of employment; • • •."

FILED
AUG 18 1961
JAMES R. BROWNING, Clerk

No. 237

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *et al.*, *Petitioners,*

v.

SWITCHMEN'S UNION OF NORTH AMERICA, *et al.*, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 237

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *et al., Petitioners,*

v.

SWITCHMEN'S UNION OF NORTH AMERICA, *et al., Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF IN OPPOSITION

Respondents, Switchmen's Union of North America and its officers, who are sued individually and as representatives of the union and its members, oppose the petition for a writ of certiorari. The United States Court of Appeals for the Second Circuit unanimously

held "clearly erroneous" (App. A to Pet., p. 49)[1] on the evidence, the findings of the District Court that there was a probable violation of the Railway Labor Act. This reversal on the evidence makes irrelevant the portions of the opinion below discussing the interrelations of the Railway Labor Act and the Norris-La Guardia Act. The case hence presents no issue deserving of consideration by this Court. Prompt denial of the petition for a writ of certiorari is essential to free the switchmen of an injunction which, as the court of appeals held, plainly exceeded the jurisdiction of the district court, as limited by the express language of Section 4 of the Norris-La Guardia Act and, "very likely" also, as limited by Section 7 of the Norris-La Guardia Act (App. A to Pet., pp. 49-50 and p. 50, n. 8). After long drawn out processing from March 1959 on, of a grievous wage inequity, through all the steps required by the Railway Labor Act, the switchmen have for almost a year been restrained by an injunction which the district court was without jurisdiction to issue. There should be no further delay in giving effect to the decision of the court of appeals that this injunction is invalid.

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[1] App. A to Pet. "denotes Appendix A to the Petition for a Writ of Certiorari;" "S.A." denotes the Switchmen's Appendix below, bearing the title "Appendix to Brief for Defendants-Appellants:" "C.A." denotes the Carriers Appendix below bearing the title "Appendix to Brief for Plaintiffs-Appellees." This form of designation is here adopted on the assumption that use of the same form of designation as appears in the Petition for a Writ of Certiorari will be convenient to all concerned.

QUESTIONS PRESENTED

1. Whether, where the district court issues a preliminary injunction based on findings that there has probably been a violation of the Railway Labor Act, the court of appeals may reverse on determining that on the evidence the findings of probable violation are clearly erroneous.

2. Whether, where union negotiators are given full power to bargain collectively on behalf of the employees, subject to only the limitation that any agreement reached to be binding must be ratified by vote on referendum of a majority of the affected employees, the ratification limitation constitutes *per se* a violation of the Railway Labor Act.

3. Whether a union violates the Railway Labor Act when its negotiators make several counterproposals and submit to referendum vote of the affected employees the best agreement they are able to obtain with the carriers but fail to recommend its acceptance and fail to ballot employees with respect to whether they wish to arbitrate the dispute.

4. Whether, where the evidence presented no issues of credibility but solely the legal effect of admitted facts, the court of appeals may properly set aside the findings of the district court which the court of appeals determines are clearly erroneous.

STATUTES INVOLVED

The pertinent provisions of the Norris-La Guardia Act (47 Stat. 70, 29 U.S.C. 101, *et seq.*) are set forth in the Appendix to this brief (pp. 34-36, *infra*). The pertinent provisions of the Railway Labor Act, as amended (48 Stat. 1185, 45 U.S.C. 151, *et seq.*) are set forth in Appendix B to the petition (Pet., pp. 51-54).

STATEMENT

At all times here material the Union has been the duly certified exclusive bargaining representative of the yard service employees of the seventeen petitioner carriers (S.A. 4). These yard service employees consist of three crafts and classes, namely: (1) yard conductors or foremen; (2) yard brakemen or helpers; and (3) switchtenders (S.A. 4).

On March 2, 1959, the Union served a formal written notice on each of the seventeen petitioner carriers reciting that in accordance with the provisions of the Railway Labor Act, notice was thereby given of the employees' desire to change the provisions of existing agreements governing rates of pay for employees represented by the Union by making increases therein as proposed in said notice (S.A. 36-37, 108). On March 20, 1959, each of the carriers acknowledged receipt of the foregoing notice from the Union and in turn gave notice of the carriers' desire to reduce wages (S.A. 37-38, 108).

Individual conferences on the Union's proposal and the carriers' counter-proposal were held on the individual properties in March 1959 (S.A. 21). When the individual carriers and the Union were unable to reach an agreement, it was arranged by correspondence between the carriers and the Union that negotiations on the foregoing notices would be handled for the carriers by the Western Carriers' Conference Committee and for the Union by its National Committee (S.A. 108). The Union's National Committee was composed of the Union's chief officials, including Neil P. Speirs, President of the Union; William R. Meyers, Executive Vice President of the Union; James Keenan, General Chair-

man of the Union on the Delaware, Lackawanna & Western Railroad Company; Floyd A. Combs, General Chairman of the Union on the Great Northern Railway Company, and John S. Tamasha, General Chairman of the Union on the Denver, Rio Grande and Western Railroad (S.A. 94, 105-106). This committee had full knowledge of all the relevant facts and full authority to enter into an agreement subject to ratification by the affected employees (S.A. 132).

The Union's National Committee met with the Western Carriers' National Conference Committee on September 17, 22 and 24, 1959 (S.A. 108). No agreement having been reached, the Union and the carriers jointly applied to the National Mediation Board for its services (S.A. 108). Conferences between the Union's National Committee and the carriers or with members of the National Mediation Board were held on 43 different occasions between September 24, 1959 and April 1960 (S.A. 108). Being unable to reach a settlement of the wage dispute, the Union accordingly requested the National Mediation Board to terminate its services (S.A. 108).

As required by Section 5(b) of the Railway Labor Act in such circumstances, the National Mediation Board on May 5, 1960 proffered arbitration to the Union and the carriers (S.A. 108-109). On May 10, 1960, the Union wrote the National Mediation Board declining arbitration and sent a copy of that letter to the Chairman of the Western Carriers' Conference Committee (S.A. 109). On May 13, 1960, after the carriers had been notified that the Union had rejected arbitration, the carriers advised the National Mediation Board that they were willing to arbitrate (S.A. 109).

The Union then circulated a strike ballot and the membership overwhelmingly voted to strike in support of their wage proposals (S.A. 21). The National Mediation Board thereupon advised the parties that all practical methods provided for in the Railway Labor Act for adjusting disputes had been exhausted without effecting settlement and that the services of the Board were being terminated (S.A. 21).

Thereafter, on May 23, 1960, the President of the United States by Executive Order No. 10878 created Emergency Board No. 131 to investigate the dispute (S.A. 39-40). The Emergency Board appointed by the President held hearings beginning May 21 and ending June 17, 1960 (S.A. 22).

While the hearings before the Board were in progress, settlements, awards and Emergency Board reports in other crafts and classes of railroad employees came to the attention of the Emergency Board No. 131, considering this dispute and conferences were had between the Board members, the Union and the carriers in which the Board members indicated that they did not believe they could properly award larger percentage increases of pay or on different terms than the pattern adopted in settlements by other crafts and classes unless the Union established that there existed special reasons why the crafts and classes represented by the Union should have different treatment (S.A. 23-26, 81-83). Hearings before the Board were thus limited to one of the bases which the Union had advanced to support its wage proposals, namely, that there existed an intra-industry inequity which should be corrected by giving the crafts represented by the Union their requested wage increases (S.A. 81-83).

On July 8, 1960, Emergency Board No. 131 issued its report to the President in which it recommended that the Union and the carriers accept the two 2 per cent wage increases which had been accepted by the road service crafts and classes (S.A. 18-34). The report correctly recited that the basic day rates of pay of road service employees and yard service employees have historically been fairly close together and continue to be so (S.A. 27), but that due to the dual basis of pay in road service the pattern settlement of a 2 per cent increase in basic day rates which became effective for freight engineers on July 1, 1960, will increase their average annual earnings by $210.16, whereas a similar percentage increase will yield only $132.70 on the average for yard service employees (S.A. 27-28).[2] This would be equally true of the second 2 per cent increase to be effective March 1, 1961 (S.A. 34). The report also recognized that the percentage differential in average hourly earnings of yard ground service employees over that of non-operating employees considered as a group has declined from about 50 per cent in the 1920's to approximately 20 per cent currently due to the preponderance of uniform cents per hour wage increases over the past 30 years (S.A. 32-33).

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[2] As of May 1, 1960, the basic day rate of yard foreman was $22.58, of yard helper $21.31 and of switchtenders $19.45, or a weighted average daily rate for yard foremen, yard helpers and switchmen of $21.74. The weighted average daily rate of passenger engineers, through freight engineers and local freight engineers came to $22.16. See page 5 of Exhibit D attached to Verified Opposition to Motion for Preliminary Injunction. The dual basis of pay for road service employees resulted in engineers with a lower rate of daily pay working for the same employer making more than $7,500 per year while the switchmen with the higher rate and working longer hours made less than $5,000 per year (S.A. 151).

The report stated that the Board however did not believe that either of the foregoing inequities justified its recommending an increase for yard ground service employees which exceeds the pattern (S.A. 28-33).

Thereafter the Union wrote the Western Carriers' Conference Committee requesting conferences for the purpose of attempting to arrive at an agreement in view of the Emergency Board's report (S.A. 111). Conferences between the Union and the carriers were held for five days in July 1960 and on July 20, 1960 the Union and the carriers reached an agreement subject to ratification by the membership (S.A. 89-92, 111, 116). The July 20, 1960, agreement was promptly submitted to a referendum vote of the membership of the Union and was defeated by a 3-1/2 to 1 vote (S.A. 111). The Union promptly notified the carriers of the rejection of the agreement and proposed that the Union and the carriers set a conference for August 30, 1960, to resume negotiations (S.A. 94). Conferences were accordingly resumed on August 30, 1960 (S.A. 95, 112). At the opening of the conference held on that date Mr. Speirs, president of the Union, stated that the Union's primary interest was to reach an agreement with the carriers, that it was then and always had been the Union's intention to reach an agreement that would settle the wage dispute (S.A. 112). However, the carriers expressed an interest only in the method by which the Union conducted the referendum of its membership and showed no interest in even attempting to discuss the issues on their merits (S.A. 112).

On September 1, 1960, the Union notified the National Mediation Board that a strike would be called on the seventeen plaintiff carriers on September 8,

1960 (S.A. 113). This placed the strike date 60 days after the date the report of the Emergency Board issued although by law only a 30 day cooling off period is required (S.A. 113).

The National Mediation Board requested that the Union postpone the strike date and thereupon the Union withdrew the strike date of September 8, 1960 and set the strike date for September 19, 1960 (S.A. 95-96, 113).

During September 1960 the Union continued to meet and negotiate with the carriers (S.A. 113-114, 121). During these conferences the Union suggested several bases for settling the dispute which it felt certain its membership would ratify (S.A. 124-125, 130). The Union variously offered to settle on the basis of a 3 per cent increase in pay effective July 1, 1960 and another 3 per cent effective March 1, 1961 (S.A. 124-125, 138-140, 145-146), or to accept only the pattern settlement as to pay increases and receive in addition fringe benefits such as improved vacations, a new paid holiday or a paid up life insurance policy (S.A. 113-114, 125-126, 131-132, 141). The carriers however refused to make any concessions beyond those to which they had agreed in the July 20, 1960 agreement (S.A. 121, 141, 145-146, 153).

On September 16, 1960 the carriers filed the instant suit (S.A. 3) and without notice to the Union obtained an *ex parte* restraining order enjoining the proposed strike (S.A. 49-51). In their complaint the carriers alleged that the Union had violated the Railway Labor Act in several respects, the chief of which was that the Union had not made every reasonable effort to make and maintain agreements because the presence in the

Union's Constitution of a provision requiring ratification by the members of the Union of each contract as a prerequisite to its validity deprived the Unions' negotiating committee of any power to bargain in good faith (S.A. 6-10, 12-13).

The complaint also alleged that at no time since the Union's service of its proposal for a wage increase and the carriers' proposal for a wage decrease had the Union treated or bargained with the carriers or offered to enter into any agreement in settlement of the proposals except by entering into the agreement which had been rejected by the membership of the Union (S.A. 9-10; and that the Union had rejected arbitration without submitting to its membership the issue of whether to arbitrate although under the Union's Constitution the Union had no authority to submit to arbitration except upon authorization by a majority vote of the membership (S.A. 6, 10, 13).

The complaint charged that in the foregoing respects the Union had not complied with the provisions of the Railway Labor Act, that the threatened strike was therefore unlawful, and that hence the Norris-La Guardia Act was inapplicable.

The complaint prayed that the Union be enjoined from engaging in a strike and be directed to bargain in good faith and to designate and give authority to representatives to make agreements (S.A. 16).

The plaintiffs filed a separate motion for preliminary injunction alleging that the Union had called a strike effective September 19, 1960, and that the strike would be unlawful because the Union had failed to bargain in good faith and had failed to exhaust the procedures of the Railway Labor Act (S.A. 48-49).

The Union filed a verified opposition to the motion for a preliminary injunction, in which the Union relied upon the Norris-La Guardia Act (29 U.S.C. 101, *et seq.*) as depriving the court of jurisdiction to issue the injunction prayed (S.A. 56). The Union alleged that the scheduled strike was for a lawful purpose (S.A. 51) and that it would be conducted in a lawful manner (S.A. 52). The Union further alleged that prior to the date fixed for the strike the Union had processed its wage proposals through all the procedures prescribed by the Railway Labor Act as preliminary to the right to strike and had waited out in full all the periods prescribed as waiting periods in that Act and hence on the date set for the strike and at all times thereafter the Union was legally entitled to call its members out on strike in support of its wage proposals (S.A. 51-52).

With respect to the contention that the ratification requirements in the Union's Constitution deprived the Union of power to comply with the bargaining requirements of the Railway Labor Act, the Union alleged that such a ratification requirement was a characteristic of collective bargaining as practiced by a substantial segment of the American labor movement as appeared from the presence of a similar provision in the constitutions of many unions, copies of which constitutional provisions were collected and attached to the verified opposition as an exhibit (S.A. 52-53, 63-80), that prior to the filing of this suit neither the National Mediation Board nor any carrier had ever claimed that the ratification requirement violated the Railway Labor Act or prevented the Union from bargaining in good faith (S.A. 53) and that the Union here had in fact treated

with the carriers and made every reasonable effort to reach an agreement (S.A. 51-52).

With respect to the allegation that the Union had improperly rejected arbitration, the verified opposition pointed out that there is no requirement in the Railway Labor Act that the Union agree to arbitration or seek from its membership authorization to arbitrate (S.A. 53).

The district court held a two day hearing on the motion for preliminary injunction in which all parties presented witnesses and exhibits (S.A. 84-152).

On October 1, 1960, the district court entered its findings of fact, conclusions of law, decision and order (S.A. 163-174) and granted a preliminary injunction restraining the Union from striking until further order of the court (S.A. 174-175). The district court held that the provision in the Union's constitution requiring ratification by the membership before any agreement became binding on them presented "serious, substantial, difficult and doubtful questions as to whether the defendants have failed and refused to exert every reasonable effort to make and maintain an agreement or agreements concerning the proposals contained in the notices of March 2 and March 20, 1959" (S.A. 167-168). The district court also found that "At no time since the service of the notices of March 2 and March 20, 1957, have the defendants or any representatives of the defendants engaged in good faith efforts to reach final agreement with the Western Carriers' Conference Committee, or offered to enter into any agreement or agreements in settlement of the proposals contained in said notices, or submitted any proposal or proposed settlement or agreement to the membership of defendant

Switchmen's Union, except for the taking of a strike ballot on the terms of the defendants' original notice of March 2, 1959, and except, further, for the submission without recommendation of the proposed agreement" (S.A. 167). The district court held that hence there was serious question as to whether the Union had complied with the Railway Labor Act and consequently the Norris-La Guardia Act was not applicable (S.A. 173). The court expressly refrained from ruling on the other issues raised in the complaint (S.A. 174).

Upon appeal, the Court of Appeals for the Second Circuit set aside as "clearly erroneous" on the evidence the findings of the district court that there was a probable failure to bargain in good faith (App. A to Pet., p. 49). The court of appeals held that the evidence established that the Union had in fact made counter-proposals (App. A to Pet., p. 48, n. 48); that as a matter of law the Railway Labor Act was not violated by the requirement that agreements negotiated by union committees be ratified by the affected employees (App. A to Pet., pp. 42-43); since no probable violation of the Railway Labor Act had been established, there was no occasion to accommodate the Norris-La Guardia Act to the Railway Labor Act; that the Norris-La Guardia Act was fully applicable and Section 4 clearly prohibited the injunction below, as "very likely" also did Section 7 (App. A to Pet., pp. 49-50 and n. 9, p. 50). The court of appeals accordingly reversed the injunction as beyond the jurisdiction of the district court (App. A to Pet., p. 50).

REASONS FOR DENYING THE WRIT

1. The petition for a writ of certiorari presents no question deserving of review by this Court. While the court of appeals began its opinion with the statement that the appeal "raises important questions as to the inter-relations of the Railway Labor Act, 45 U.S.C. §§ 151 ff., and the Norris-La Guardia Act, 29, USC. §§101 ff." (App. A to Pet., p. 30), the court expressly refrained from deciding any of these important questions (App. A to Pet., p. 41). At the point in its opinion where the court stated the lack of necessity to define the area of accommodation between these two statutes, the court held that accommodation at most would be needed in "a clear case of union failure to comply with obligations under the Railway Labor Act, and the record affords no warrant for finding that in the instant case" (App. A to Pet., p. 41).

The first question which is urged in the petition for a writ of certiorari (p. 2), is premised, we believe, on an assumption that the court below held that there must be a clear showing of a violation of the Railway Labor Act before it was necessary to decide if a district court had jurisdiction under the Norris-La Guardia Act temporarily to enjoin a strike. But the actual holding of the court below was that in this case there was no evidence of any possible violation of the Railway Labor Act and hence the findings of probable violation were "clearly erroneous" (App. A to Pet., p. 49). For here in distinguishing *Hamilton* v. *Benrus,* 2 Cir., 1953, 206 F. 2d 738, 740, which formulates the rule for issuance of a temporary injunction in the terms upon which petitioner bases its first question (Pet., p. 2) and its argument (Pet., pp. 11-12), the court below stated (App. A to Pet., pp. 48-49):

"Appellees say this does not matter in view of the judge's alternative finding that 'There are serious, substantial, difficult, and doubtful questions' on the issue of good faith. They urge that since it is only a temporary injunction we are reviewing, and no one has contested the finding that irreparable damage would flow from its denial, the only point open to review is whether even this alternative finding was clearly erroneous, citing particularly our decision in *Hamilton Watch Co.* v. *Benrus Watch Co.*, 206 F. 2d 738, 740 (2 Cir. 1953), from which the quoted language was evidently taken.

"We think this an overly literal reading of *Hamilton* v. *Benrus;* the language quoted from Judge Frank's opinion must be taken along with the beginning of the sentence, 'To justify a temporary injunction it is not necessary that the plaintiff's right to a final decision, after a trial be absolutely certain, wholly without doubt,' and the statement that the Court could not 'possibly' declare the District Court's substantive findings of probable Clayton Act violation to have been clearly erroneous. Here we regard the finding of breach of the Railway Labor Act by the Union as being so on the evidence the judge had before him; *Hamilton* v. *Benrus* does not say it is enough that further evidence might demonstrate it was not."

We believe a careful reading of footnote 8 of the court's opinion also shows that the court below regarded the record as having "no proof" of violations of the Railway Labor Act. In this footnote the court stated (App. A to Pet., p. 50, n. 8):

"The Switchmen here urge that the injunction was also unlawful under § 7, both because violations of the Railway Labor Act are not 'unlawful acts' within § 7(a) and because there is no proof

> of such violations in this case. For reasons pointed out in the text, we think the first proposition scarcely reconcilable with the *Virginian, Graham* and *Howard* cases. The second is very likely so, but our holding as to § 4 is dispositive."

We believe the word "so" in the phrase "very likely so" refers to the reconcilability with the *Virginian, Graham* and *Howard* cases of treating Section 7 of the Norris-La Guardia Act as barring an injunction when there is no proof of unlawful acts. Thus, the court is saying that where, as here, there is no proof of any unlawful act, treating the injunction as barred by Section 7 of the Norris-La Guardia Act is very likely reconcilable with the *Virginian, Graham* and *Howard* cases.

Therefore, we respectfully urge that the first question stated in the petition (p. 2) is not presented by the record in this case. We do not believe a case can be said to present "serious, substantial, difficult and doubtful questions going to the merits of the case" when the evidence clearly shows there is not even a probable case.

2. While we do not believe the first question stated in the petition is presented by the record in this case, the court below as a third alternative ground for reversing the injunction ruled on this question in favor of the Union. It's ruling on this question was beyond question correct and for that reason affords no occasion for further review by this court. In this respect the court stated (App. A to Pet., pp. 49-50):

> "Beyond this, whatever the general rule as to the scope of review of temporary injunctions may be, no such principle as plaintiffs advocate can be applicable to a claim that such an injunction transgresses the command of § 4 of the Norris-La Guardia Act. That section uses the most emphatic

> words possible—'No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction' against a peaceful strike. To overcome that bar plaintiffs had the burden of showing, as a matter of law, that the broad command of § 4 is subject to an exception when a Union has violated its duties under the Railway Labor Act and, as a matter of fact, that the defendant here had done that. They were obliged to meet that burden, not simply to show they might be able to meet it; until they met it, the court was without power to issue an injunction whether temporary or permanent." (footnotes omitted)

Both the express language and the legislative history of the Norris-La Guardia Act show that Congress intended to impose different requirements for temporary injunctions in labor cases than were applicable to non-labor cases. Section 4 of the Norris-La Guardia Act deprives all United States courts of jurisdiction to issue any temporary injunction, in a case involving a labor dispute, to prohibit any person interested in such dispute from going on strike (29 U.S.C. 104 (a)). Section 7 of the Norris-La Guardia Act deprives all United States courts of jurisdiction to issue any temporary injunction of any sort in a labor dispute except upon finding that unlawful acts have been threatened and will be committed unless restrained and that public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection (29 U.S.C. 107 (a) and (e)).

Tested by the foregoing jurisdictional standards, the preliminary injunction issued here (S.A. 174-175) exceeded the jurisdiction of the district court in three respects. It prohibited a strike by persons admittedly

interested in a labor dispute within the meaning of the Norris-La Guardia Act (S.A. 174-175). It issued an injunction in a labor dispute without making the requisite findings that unlawful acts have been threatened and will be committed unless restrained and that police protection is inadequate.

No rules in non-labor cases with respect to the discretion of a judge to preserve the *status quo* by a temporary injunction are relevant where, as here, the district court was wholly without jurisdiction to enjoin a strike and without jurisdiction to issue an injunction except on findings of unlawful acts and inadequate police protection.

Congress by providing as a jurisdictional prerequisite in Section 7 of the Norris-La Guardia Act (29 U. S.C. 107) to the issuance of both temporary and permanent injunctions the same requirements of hearing the testimony of witnesses in open court and the same findings of fact that unlawful acts have been threatened and will be committed unless restrained, obviously meant to, and did, eliminate the distinction between temporary and permanent injunctions which exists in non-labor cases and is typified by the law with respect to scope of review set forth in the petition (pp. 11-12). Section 7 makes it clear that the same finality of findings with respect to both law and fact as is required for permanent injunctions is a jurisdictional prerequisite to a temporary injunction in a labor dispute case. Section 7 provides (29 U.S.C. 107):

> "No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in this Act, except after hearing the testimony of witnesses in open court

(with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

"(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

"(b) That substantial and irreparable injury to complainant's property will follow;

"(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

"(d) That complainant has no adequate remedy at law; and

"(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection."

This treatment of temporary and permanent injunctions in identical fashion makes untenable any contention that a more indefinite form of finding suffices to support a temporary injunction than is required for a permanent injunction.

The legislative history of the Norris-La Guardia Act shows that its proponents meant by Section 7 (a) to require an actual finding of unlawfulness as a preliminary to any injunction. Congressman La Guardia in-

sisted that bill "prevents the courts from enjoining lawful acts" (75 Cong. Rec. 5479). Senator Norris similarly stated (75 Cong. Rec. 4505, 4507, 4508):

> "The Abuse of the Power of Injunction—one of the indefensible things contained in a great many of the labor injunctions issued by Federal judges is the enjoining of the defendants from exercising their legal right under state law given them by a State statute.
>
> * * * * * * * * * *
>
> "* * * Something is made a crime which is not a crime under the law."

Senator Blaine in supporting the bill on the floor of Congress stated (75 Cong. Rec. 4630):

> "Yet, more important are the provisions relating to the proof upon which injunctions and restraining orders may be issued. Before any such order can be issued the court must find that unlawful acts have been committed by the defendants and are likely to be continued. * * *"

Senator Blaine further emphasized the need to require findings of actual unlawfulness before an injunction issues, in the following colloquy (75 Cong. Rec. 4779):

> "Mr. Logan: What I desire to ask the Senator is on that very point. Is it the contention of the Senator that an injunction might be granted without the establishment of the fact that an unlawful act had been committed?
>
> "Mr. Blaine: And will be continued?
>
> "Mr. Logan: Yes. Can an injunction be obtained under that state of facts without first establishing that an unlawful act has been committed?

That must be established before it is possible to issue an injunction?

"Mr. Blaine: And that that act will be continued unless restrained. Why should an injunction issue if an unlawful act has not been committed?

"Mr. Logan: Suppose it has only been threatened. Suppose they have said, 'We are going to commit this act,' and it has not yet been committed.

"Mr. Blaine: I do not think we ought to base this bill upon the proposition that somebody has a fear that somebody is going to do something. There ought to be proof that unlawful acts have taken place — they may not be overt acts at all; they may be of some other character — and that those acts will continue and that irreparable and substantial injury to complainant's property will follow besides the other necessary allegations.

"Mr. Glenn: As I understand the Senator's position, it is that no restraining order or injunction should be granted until some unlawful act has been committed. That is the position?

"Mr. Blaine: That precedent to the commencement of this suit there must have been an unlawful act committed and an allegation that it will continue."

Under the guise of maintaining the *status quo* until it could determine whether the requirement of ratification violated the Railway Labor Act, the district court enjoined acts without actually finding them illegal. Whether this was done under the guise of postponing the jurisdictional or the substantive issue until a hearing on the merits, the result was the same—a strike has been enjoined which is obviously a perfectly legal strike. The district court had no power to assume jurisdiction on the theory the Railway Labor Act may have dis-

placed the Norris-La Guardia Act. At most it would have had jurisdiction if it had found (which clearly it could not correctly have found) that as to the facts here involved the Railway Labor Act did displace the Norris-La Guardia Act.

3. There are no conflicting decision. As the court below pointed out (App. A to Pet., p. 50, n. 7), in *Railroad Yardmasters* v. *Pennsylvania R. Co.*, 3 Cir., 1955, 224 F. 2d 226, "there was no determination by the Court of Appeals that the substantive finding which the District Court had made on the evidence presented in that case of threatened unlawful action by the railroad, was clearly erroneous." Here, of course, there was such a finding (App. A to Pet., p. 49). Moreover, there was no injunction barring a strike in that case and no issue of whether the absolute language of Section 4 of the Norris-La Guardia Act can give way to accommodate the Railway Labor Act in any case involving a major dispute for which no ultimate sanction but the strike is provided by the Railway Labor Act.

In *Missouri-Kansas-Texas Railroad Co.* v. *Randolph*, 8 Cir., 1950, 182 F. 2d 996, there was no major dispute but a minor dispute involving interpretation and application of contracts which were cognizable by the National Railroad Adjustment Board. The injunction maintained the *status quo* while resort was had to the National Railroad Adjustment Board (see *Randolph* v. *Missouri-Kansas-Texas R.R. Co.*, D. C. N. D. Mo. 1949, 85 F. Supp. 846). The issues there involved are thus, entirely different from those present here. Moreover, the court of appeals in the *Randolph* case ruled there was no abuse of discretion by the district court whereas the court below obviously deemed the district court had abused its discretion in issuing an injunction

when there was no proof of even a probable violation of law.

4. As its second question the petition states (Pet., p. 2):

> "2. Does the Railway Labor Act require that the representatives of the parties to a major railroad labor dispute be authorized to decide such a dispute in conference?"

Here the record shows that the representatives of the parties were in all respect authorized to decide the dispute in conference, subject to only one qualification, that the decision must be ratified by the affected employees. The district court did not decide whether the ratification practice of the union violated the Railway Labor Act, but ruled that that practice taken together with its view that the union negotiators had not made any proposals or counter-proposals, had not recommended to employees adoption of a proposed agreement which was submitted to employee referendum and had not balloted the employees as to arbitration, raised serious and doubtful questions as to whether the union had bargained in good faith (S.A. 167-168, 169, 172-174). The court of appeals ruled that the ratification requirement did not violate the Railway Labor Act (App. A to Pet., pp. 42-43). This ruling is in accord with the express language of the Railway Labor Act, the clear Congressional expression of intent to encourage use of the ratification procedures, the universality of this practice in the labor movement, and the uniform approval of this practice by judicial and administrative decisions.

The provisions of the Railway Labor Act dealing with the duties of railroads and their employees with respect to collective bargaining and the authority of

representatives of each in dealing with the other are set forth in Sections 2, First and Second of that statute. These sections read as follows:

> "First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.
>
> "Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute."

This language does not say that representatives of employers must be authorized to sign a binding agreement without any further ratification. It says only that such representatives shall be authorized "to confer," "to consider," and "if possible" decide disputes.

The requirement of authority to "confer" clearly does not carry with it a requirement of authority to make a binding agreement without ratification. *First National Bank of Lowell* v. *Lowell National Bank,* 47 F. Supp. 925, (D.C.N.D. Ind., 1942).

In this case the representatives of the Union were authorized by the Union's governing law to confer, consider, and decide the dispute between the Union and the carriers by making a settlement or agreement subject only to the condition that any such settlement or

agreement be ratified by the Union membership (S.A. 164, 165). Such authorization clearly met the statutory requirement.

They in fact did reach an agreement with the carriers based on the Emergency Board report subject only to ratification, by the union membership (S.A. 166). Such action went beyond any statutory requirement.

Section 2, First and Section 2, Second of the Railway Labor Act had their ogigin in (41 Stat. 456) the Transportation Act of 1920. The basic language of these Sections first appeared in Section 301 of H.R. 10453, which was introduced in 1919 before the 66th Congress, 1st Session, as part of proposed new legislation removing railroads from war time government ownerships. The Senate bill, S. 3288, 66th Congress, 1st Session, did not contain any comparable provision. The ultimate bill adopted, which became Section 301 of Part III of the Transportation Act of 1920, laid down the duties of employees and carriers in substantially the same language as is contained in the present Section 2, First and Second of the Railway Labor Act. Such Section 301 reads as follows:

> "It shall be the duty of all carriers and their officers, employees, and agents to exert every reasonable effort and adopt every available means to avoid any interruption to the operation of any carrier growing out of any dispute between the carrier and the employees or subordinate officials thereof. All such disputes shall be considered and, if possible, decided in conference between representatives designated and authorized so to confer by the carriers, or the employees or the subordinate officials thereof, directly interested in the dispute. If any dispute is not decided in such conference, it shall be referred by the parties thereto

to the board which under the provisions of this title is authorized to hear and decide such dispute."

The Conference Report on this legislation (Rept. 650, 66th Cong., 1st Session, dated February 18, 1920) states that the effect of this provision is to require carriers and employees "to appoint representatives to confer." This statement at page 60 of the Report reads in full as follows:

> "The House bill makes it the duty of carriers and their employees to take all possible means to adjust their differences in the first instance before referring any dispute to any adjustment board. The Senate amendment had no provision upon this subject. The conference bill contains a declaration, similar to that in the House bill, directing the officials of a carrier and their employees to appoint representatives *to confer* over all matters of dispute." (Emphasis added.)

When the Railway Labor Act of 1926 was adopted (44 Stat. 577), Section 301 of the 1920 legislation was rewritten as Section 2, First and Second of the new statute in the identical language of such Sections in the present Act.

In reporting these proposed provisions the House Committee on Foreign and Interstate Commerce stated in pertinent part.[3]

> "The bill provides in brief as follows:
>
> "(1) It is made the duty of all railroad managers and employees to exert every reasonable effort to make and maintain agreements.

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[3]Report No. 328, 69th Cong., 1st Sess., February 19, 1926, on H.R. 9463, page 3.

"(2) All disputes *shall be considered first in conference* between representatives designated and authorized so to confer respectively by the carrier and by the employees thereof interested in the dispute." (Emphasis supplied.)

* * *

The Report of the Senate Committee on Interstate Commerce on the 1926 legislation is to the same effect. This report reads in pertinent part as follows:[4]

"Briefly stated, the bill provides—

"First, That it shall be the duties of the parties to exert every reasonable effort to make and maintain agreements.

"Second. That any and all disputes shall first be *considered* in conference between the parties directly interested." (Emphasis supplied.)

* * *

As indicated above, subsequent changes in the Railway Labor Act did not affect the language of Sections 2, First and Second.

These Congressional reports on the intent of Sections 2, First and Second of the Railway Labor Act show that Congress intended only what the language of these Sections clearly states, i.e., that disputes be "considered" in conference between representatives of employers and of carriers and that such representatives make reasonable efforts to settle such disputes. The

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[4] Rep. No. 606, 69th Cong., 1st Sess., April 16, 1926, on H.R. 9463. The Report of the Senate Committee on Interstate Commerce on S. 2306, a bill identical to H.R. 9463 (Rep. No. 222, 69th Cong., 1st Sess., February 22, 1926) contains the same statements as are quoted from Rep. No. 606.

designation of union representatives with authority to settle a dispute by making an agreement, subject only to the vote of the union membership, and making of such an agreement by these representatives subject only to such condition, fully complies with this intent. There is not the slightest suggestion in the legislative history of these Sections of the statute to support the petitioners' position.

The great prevalence of provisions in the constitutions of unions requiring ratification of contracts by employees affected, shows this practice is a common feature of collective bargaining. A list of different national or international unions, which require membership ratification of all contracts was attached to the union's verified opposition filed in the district court (S.A. 52-53, 63-80). In connection with preparing the briefs below, the Union examined the files of the Department of Labor and found that 80 different national or international unions, including at least a dozen subject to the Railway Labor Act, reported that either by constitutional provision or practice all union contracts were ratified by affected employees as a prerequisite to becoming legally binding. Neil W. Chamberlain, Collective Barbaining, 1951, pp. 77, 80, states:

> "This requirement of membership ratification, by majority vote, of any agreement reached by union representatives is almost universal. * * *"

To the same effect see Harold W. Davey, Contemporary Collective Bargaining, 2d ed., 1959, p. 234; Edwin F. Beal and Edward D. Wickersham, The Practice of Collective Bargaining, 1959, p. 274; Lloyd C. Reynolds, Labor Economics and Labor Relations, 3rd ed., 1959, p. 178.

The advantages to be derived from membership ratification of contracts have been variously described. The American Civil Liberties Union, Democracy in Trade Unions, N.Y., Nov. 1943, p. 72, comments:

> "* * * Membership approval of contracts entered into, or the formulation of general demands or minimum standards are obviously desirable practices, and if more widely established would avoid the sell-outs and corruption which have marked some union dealings."

Section 201 (a) (5) (K) of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. 431 (a) (5) (K)) requires unions to file with the Secretary of Labor public reports disclosing among other things what provision the union makes for ratification of contract terms. This section is applicable to labor organizations which have been certified as collective bargaining representatives under the Railway Labor Act, see Labor Management Reporting and Disclosure Act, Section 3 (c) and (j) (29 U.S.C. 402 (c) and (j)).

The committee reports show that the intent of Congress in requiring a public report of contract ratification procedures available within the union was to be certain that union members were aware of such procedures so they could avail themselves thereof. See S. Rept. No. 187, on S. 155, 86th Cong., 1st Sess., pp. 6, 8 (Leg. His. LMRDA, pp. 402, 404) where it is stated:

> "Under the National Labor Relations Act and the Railway Labor Act, a labor organization has vast responsibility for economic welfare of the individual members whom it represents. Union members have a vital interest, therefore, in the policies and conduct of union affairs. To the extent that union procedures are democratic they

permit the individual to share in the formation of union policy.

* * * * * * * * * * *

"* * * the rules governing the conduct of the union's business all should be known to the members. Without such information freely available it is impossible that labor organizations can be truly responsive to the members they serve."

The fact that Congress in the Landrum Griffin Act required all unions, those subject to the Railway Labor Act as well as those under the National Labor Relations Act, to make public their procedures for contract ratification so their members could know and insist on having such procedures followed, shows Congress regarded ratification as helping rather than hindering desirable collective bargaining.

The uniform holding of the National Labor Relations Board and the courts in cases arising under the National Labor Relations Act has been that ratification procedures were entirely consistent with good faith bargaining. This has been true with respect to both employer representatives who had to go back to their principals before concluding a binding contract[5] and to union committees whose negotiations were subject to employee ratification.[6]

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[5] *Lloyd A. Fry Roofing Co.* v. *N.L.R.B.*, 9 Cir., 1954, 216 F. 2d 273, 275; *Great Southern Trucking Co.* v. *N.L.R.B.*, 4 Cir., 1942, 127 F. 2d 180, 185, certiorari denied, 317 U.S. 652.

[6] *N.L.R.B.* v. *New Britain Machine Co.*, 2d Cir., 1954, 210 F. 2d 61. Actually there has never been any case so far as we can find in which it was ever charged that a union refused to bargain collectively because its negotiators could not bind their constituency except after ratification although the Board has regularly mentioned the need for employee ratification when denying a com-

We believe that this question was correctly decided and there is no need for review by this Court.

5. By its third question the petitioners ask this Court to review the course of bargaining between the parties and upset the determination of the court of appeals that the record contains no evidence that the Union bargained in bad faith. This, we submit is not, a proper question for this Court.

Moreover the various alleged defects in the Union's conduct were each baseless, as the court below held. The requirement of ratification, as we have seen, is entirely proper and legal. The failure to recommend to the employees that they accept the proposed contract based on the Emergency Board Report was, as the court below pointed out (App. A to Pet., p. 47), completely in good faith and legal. Whether the law requires any counterproposals, the Union negotiators did make several counterproposals, as the court below found (App. A to Pet., p. 48, n. 5; S.A. 114, 121, 124-125, 130-132, 138-137, 141-146). The failure to submit to referendum the issue of whether to arbitrate was not a violation of the Railway Labor Act. Section 7, First of the Railway Labor Act expressly provides "That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this Act or otherwise."

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plaint that employer negotiators were not fully authorized to bind their principal. *Capital Transit Co.*, 1953, 106 N.L.R.B. 169; *Elgin Standard Brush Mfg. Co.*, 1950, 98 N.L.R.B. 1467, 1484; *W. W. Cross & Co., Inc.*, 1959, 77 N.L.R.B. 1162, 1166, n. 11, enforced 1 Cir., 1950, 174 F. 2d 875; *Shell Oil Co.*, 1948, 77 N.L.R.B. 1306, 1307, n. 4; *The Fort Industry Co.*, 1948, 77 N.L.R.B. 1287, 1300; *Milwaukee Electric Tool Corp.*, 1954, 110 N.L.R.B. 977, 978.

We know of no basis on which the petitioners can properly urge that any illegality inhered in the Union's refusal of the proffer of arbitration.

6. In its fourth question petitioners seek from this Court a review of the propriety of the court of appeals' setting aside as "clearly erroneous" the findings of the district court (Pet., pp. 3, 24-27). Petitioners claim a violation of Rule 52 (a) of the Federal Rules of Civil Procedure (Pet., p. 24). Petitioners admit that the court of appeals termed the findings of the district court "clearly erroneous" but argue this was a mere subterfuge (Pet., p. 24). The record we submit, however, shows beyond doubt that the district court's findings were "clearly erroneous." There was no issue of credibility. Indeed, a reading in context of the testimony of the petitioners' witnesses quoted (Pet., p. 25) shows that in testifying that the Union made no counterproposals, the witnesses were being very technical about what they called an offer or counterproposal. They never denied the testimony of the Union's president, Neil P. Speirs, that he assured the carriers that if they agreed to some slight increase over the formal pattern formula he could get membership ratification (S.A. 124-125, 130). As such changes he suggested a 3 per cent increase in pay effective July 1, 1960 and another 3 per cent effective March 1, 1961 (S.A. 124-125, 138-140, 145-146) or two 2 per cent increases in pay plus fringe benefits such as improved vacations, a new paid holiday or a paid up life insurance policy (S.A. 113-114, 125-126, 131-132, 141).

CONCLUSION

The record here presents no question warranting review by this Court. The court of appeals by its unanimous decision and carefully reasoned opinion, correctly applied the law. There should be no further delay in freeing the employees from the onus of working under an injunction issued by a court which was without jurisdiction to issue such an injunction.

We respectfully submit that the petition for a writ of certiorari should be denied.

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August 16, 1961

APPENDIX

The pertinent provisions of the Norris-La Guardia Act (47 Stat. 70, 29 U.S.C. 101, *et seq.*, are as follows:

"Sec. 1. No court of the United States, as defined in this Act, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this Act; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act.

* * * * * * *

"Sec. 4. No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

"(a) Ceasing or refusing to perform any work or to remain in any relation of employment; * * *

* * * * * * *

"(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

'(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

"(g) Advising or notifying any person of an intention to do any of the act heretofore specified;

"(h) Agreeing with other persons to do or not to do any of the act heretofore specified; and

"(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, • • •

• • • • • • •

"Sec. 7. No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in this Act, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

"(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

"(b) That substantial and irreparable injury to complainant's property will follow;

"(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

"(d) That complainant has no adequate remedy at law; and

"(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection."

• • • • • • •

"Sec. 13. When used in this Act, and for the purposes of this Act—

• • • • • • •

"(c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee."

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 237

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *et al.*, *Petitioners,*

vs.

SWITCHMEN'S UNION OF NORTH AMERICA, *et al.*, *Respondents.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

---

REPLY TO BRIEF IN OPPOSITION

I.

RESPONDENTS' INTERPRETATION OF THE DECISION BELOW IS WHOLLY ERRONEOUS.

In order to avoid the questions presented by this petition for certiorari, respondents contend (Resp. Br., pp. 14-16) that the court below found to be "clearly erroneous" the District Court's Finding 11 that respondents' conduct and constitution raise "serious, substantial, difficult, and doubtful questions going to the merits of this case" (S.A. 167-168. The court below did nothing of the kind. To the contrary, the court labored mightily to avoid that precise question (App. A, pp. 48-50).

The District Court made alternative findings—10 and 11—in support of the relief it granted. Finding 10 (S.A. 167) was that respondents had in fact failed to bargain in good faith. It was on the basis of this finding that the District Court concluded that the respondents had failed, as a matter of law, to carry out the minimum requirements of the duty to negotiate imposed upon them by the Railway Labor Act (S.A. 173), and it was this finding which the court below held to be "clearly erroneous" on the basis of the preliminary record then before it (App. A, p. 49).*

When it came to Finding 11, however, the court below did not hold that finding to be "clearly erroneous". The court specifically rejected *petitioners'* contention that, in order to reverse, it must determine that Finding 11 was clearly erroneous (App. A, pp. 48-49), and instead, reverted to its conclusion that to authorize a preliminary injunction to preserve the status quo in a suit to enforce the Railway Labor Act, the Norris-La Guardia Act required immediate proof of a "clear case" of failure to comply with the Railway Labor Act (App. A, p. 41). The court below concluded that injunctive relief was precluded by its determination that the record then before it did not show such a clear violation (App. A, p. 49). It reemphasized this position by stating that where the party resisting a preliminary injunction raises the Norris-La Guardia Act as a defense, ". . . plaintiffs had the burden of showing, as a matter of law, that the broad command of § 4 is subject to an exception when a Union has violated its duties under the Railway Labor Act and, as a matter of fact, that the defendants here had done that" (App. A, p. 49).

The propriety of this standard for preliminary relief preserving the status quo in actions to enforce the man-

* This determination was a clear abuse of the Court of Appeals' authority (Pet., pp. 24-27 and pp. 8, 9, *supra*).

datory obligations imposed by the Railway Labor Act is one of the principal issues for which review is sought (Pet., pp. 2, 11-16). Respondents' contention that this question is not presented in this case is not only in error, it is an insult to the intelligence of the court below. If Finding 11 were "clearly erroneous," the injunction issued would be improper under any standard, and the court below would never have found it necessary to engage in an extended discussion of a special standard for reviewing the issuance of preliminary injunctions under the Norris-La Guardia Act (App. A, pp. 49-50).

The court below found Finding 11 to be, not "clearly erroneous," but legally insufficient in this kind of case. In this its decision was both wrong and in conflict with decisions of other circuits. This Court should review this question of law.

II.

RESPONDENTS' CONCEPTION OF THE RELATIONSHIP BETWEEN THE RAILWAY LABOR ACT AND THE NORRIS-LA GUARDIA ACT IS WHOLLY ERRONEOUS.

Respondents do not really attempt to justify the strict standard imposed by the court below on the granting of a preliminary injunction to preserve the status quo in an action to enforce the Railway Labor Act. The real thrust of their argument (Resp. Br., pp. 16-22) is that § 4 of the Norris-La Guardia Act bars any temporary injunction against a strike, and that § 7 bars any temporary injunction at all in a labor dispute except in strict conformity with the terms of that section (Resp. Br., pp. 17-19).

This Court's decision in *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana R. R. Co.*, 353 U.S. 30, is a complete answer to respondents' § 4 argument. Obviously, in a proper case, a strike may be enjoined.

As the court below noted (App. A, p. 50, n. 8), respondents' § 7 argument is "scarcely reconcilable with the *Virginian, Graham* and *Howard* cases." Respondents' argument reflects a complete misunderstanding of the relationship between the Acts in question. As this Court said in *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768, 774, and repeated in the *Chicago River* case, 353 U.S. 30, 42, where injunctive orders are issued to enforce compliance with the Railway Labor Act, they are issued "notwithstanding the provisions of the Norris-La Guardia Act," and not because it is somehow possible to reconcile that relief with the terms of the Norris-La Guardia Act. Where the effect of an injunction is to proscribe a threatened violation of an explicit command of the Railway Labor Act, the Norris-La Guardia Act's prohibitions simply are not applicable. *Railroad Yardmasters* v. *Pennsylvania R. Co.*, 224 F. 2d 226 (3d Cir., 1955).

The standard imposed by the court below as a test for granting preliminary relief to preserve the status quo in a case to enforce compliance with the Railway Labor Act is no more defensible than respondents' assertion that the Norris-La Guardia Act bars any such relief.

Under the decision below, where an action is brought to enforce compliance with the Railway Labor Act, the mere *claim* that the relief sought is barred by the Norris-La Guardia Act is deemed sufficient to preclude preliminary relief to preserve the status quo, unless proof is immediately made which would justify final and permanent relief. There is no justification for such an exception to the ordinary standards under which a preliminary injunction may issue. Under the decisions of this Court, the question

of the applicability of the Norris-La Guardia Act in such a case depends upon whether or not the Railway Labor Act has been violated. If the Railway Labor Act has been violated, the Norris-La Guardia Act does not apply; if the Railway Labor Act has not been violated, it does. And until the issues raised by the complaint have been settled, it cannot be determined whether or not the Norris-La Guardia Act applies. Since, as this Court has held, the purpose and policy of *both* acts must be preserved, there is no reason why a claim based on one act should be given preference over a claim based on the other. The mere invocation of one statute should not preclude the preservation of the status quo to permit orderly consideration of the merits of a serious and substantial claim based on another.

III.

RESPONDENTS' ATTEMPT TO DISTINGUISH THE DECISIONS OF THE THIRD AND EIGHTH CIRCUITS IS WITHOUT MERIT.

In *Railroad Yardmasters* v. *Pennsylvania R. Co.*, 224 F. 2d 226, and *Missouri-Kansas-Texas R. Co.* v. *Randolph*, 182 F. 2d 996, the Courts of Appeals for the Third and Eighth Circuits, respectively, held that the ordinary standards governing preliminary injunctive relief to preserve the status quo apply to actions brought to enforce the Railway Labor Act, even though the relief sought was claimed to violate the Norris-La Guardia Act. In this case, the court below held that those standards did not apply (App. A, p. 49). In the *Railroad Yardmasters* case, the court held that "the raising of substantial and serious doubts" was sufficient to justify a temporary injunction, notwithstanding the Norris-La Guardia Act; the court below said it was not. In the *Missouri-Kansas-Texas* case, the court said that such relief did not involve the merits

of the controversy; the court below said the merits must be finally resolved as a prerequisite to such relief. These decisions are in conflict with the decision below, and specious attempts to distinguish the cases (Resp. Br., p. 22) cannot change that fact.

The fact that one case involved an injunction subject to § 7 of the Norris-La Guardia Act rather than a strike subject to § 4, is wholly irrelevant. This Court held in the *Chicago River* case that strikes may be enjoined.

And it is equally irrelevant that one case involved a "minor" dispute, while this case (like the *Yardmasters'* case) involves a "major" dispute. The rationale for granting relief against violations of the Railway Labor Act in the course of minor disputes is equally applicable to granting such relief in major disputes (see App. A, pp. 38, 39, 40; and see Pet., pp. 10-11).

IV.

RESPONDENTS' BARGAINING REPRESENTATIVES WERE NOT AUTHORIZED EITHER TO BARGAIN OR TO DECIDE AS REQUIRED BY THE RAILWAY LABOR ACT.

At page 24 of their brief, respondents admit, as they must, that the Railway Labor Act requires that the parties to a labor dispute shall appoint representatives for bargaining who "shall be authorized 'to confer,' 'to consider,' and 'if possible' decide disputes." They attempt, however, to avoid the force of this admission by asserting that the requirements of the Act were met because their representatives were "authorized by the Union's governing law to confer, consider, and decide the dispute between the Union and the carriers by making a settlement or agreement subject only to the condition that any settlement or agreement

be ratified by the Union membership" (Resp. Br., pp. 24-25). This is a mere play on words.

In point of fact, respondents' negotiators had no authority to make any agreement other than to enforce their original demands (S.A. 60-61, 140, 158; and see S.A. 132). They had no authority to accept the arbitration proffered by the National Mediation Board or to accept the recommendation of a Presidential Emergency Board (S.A. 61). They didn't even have any way of securing authority to propose a compromise to the railroad negotiators (S.A. 127; Pet., p. 23).

The only "conferring" these negotiators could do was mere talking; the only "consideration" they could give was purely personal; and the only "decision" they could make was whether or not to permit the members to have a chance to decide for themselves (S.A. 126, 129, 156). The "condition" imposed on their authorization—that every decision be ratified by vote of the membership—effectively deprived them of all authority to carry out the mandatory duties imposed by the Railway Labor Act.

Respondents seek to justify their failure to confer adequate authority upon their negotiators by relying on practices which are permissible in industries not covered by the Railway Labor Act, and on an assumed Congressional policy favoring ratification clauses in union agreements (Resp. Br., pp. 23-31). All that Congress did in the Landrum-Griffin Act was require that members be informed of a union's internal rules; it did not prescribe what those rules should be. The Railway Labor Act, by its terms and as it has been construed by the agency which must administer the Act and those who are governed by it, plainly requires that bargaining be conducted through representatives authorized to decide disputes (Pet., pp. 16-22). That command cannot be defeated by inferences based upon irrelevant statutes, procedures, or decisions.

V.

THE DISTRICT COURT PROPERLY FOUND THAT RESPONDENTS FAILED TO BARGAIN IN GOOD FAITH, AND THE COURT OF APPEALS EXCEEDED ITS AUTHORITY IN DISREGARDING THAT FINDING.

Respondents contend that petitioners seek to have this Court review the evidence and substitute its judgment of the facts for that of the Court of Appeals (Resp. Br., p. 31). To the contrary, what petitioners seek is to have this Court, as it has so often done in the past, set aside the Court of Appeals' invasion of the fact-finding authority of the *trial court*, and to impose upon the court below a decent regard for findings of fact based on substantial evidence and face-to-face observation of witnesses. Neither this Court nor the court below is the proper trier of fact in this case.

Petitioners have set forth in their petition the basis of the District Court's determination that respondents failed to bargain in good faith and the manner in which the court below ignored the requirements of Rule 52(a) (Pet., pp. 22-27). Respondents answer that

(1) they know of no reason why their membership should have been permitted to decide the question of arbitration (Resp. Br., pp. 31-32);

(2) their negotiators did make counterproposals (Resp. Br., p. 31); and

(3) Mr. Speirs "assured the carriers" that if they offered a 3 per cent increase or the 2 per cent pattern settlement plus fringe benefits, e.g., improved vacations, "he could get membership ratification", but that the railroads refused to go beyond their July 20 offer which had already been rejected (Resp. Br., pp. 9, 32).

As to the first point, it is obvious that where the authority to decide is vested in the membership, and not the negoti-

ators, good faith bargaining requires that such questions be submitted to those empowered to act. *Producers Produce Co. and Amalgamated Meat Cutters Union,* 23 NLRB 876 (1940).

As to the second, the testimony of witnesses appearing personally before the District Court was in conflict, and the District Court found that the union's representatives made no counterproposals (Pet., p. 25; S.A. 167).

And, as to the third, Mr. Speirs made no "assurances" of any kind to the railroads except in his capacity as a witness in this proceeding, testifying in opposition to the entry of an injunction (S.A. 125). Furthermore, as respondents know full well, and as the court below was informed, at the time the injunction was entered the railroads offered the 2 per cent pattern settlement, plus improved vacations, to the SUNA membership. Although this offer was accepted by the majority of the employees represented by SUNA on 13 of the 17 petitioning railroads, it did not become effective as the basis of a settlement of this dispute because the SUNA constitution requires approval by a majority of all of SUNA's members.

CONCLUSION

The questions presented by the decision below are those set forth in the petition. For the reasons stated in the petition, a writ of certiorari should issue to review those questions and the decision below.

Respectfully submitted,

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